In the Supreme Court of the United States.

In the Matter

of

The Application of Mary Dunn, in her own behalf, and as next friend of Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, minors, and Amanda Dunn, for a writ of mandamus against the Honorable Edward R. Meek, District Judge of the United States for the Northern District of Texas, and against the Circuit Court of the United States for the Northern District of Texas.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now come the petitioners, Mary Dunn, in her own behalf and as next friend of Walter Dunn, George Dunn, James Dunn and Ancel Dunn, minors, and Amanda Dunn, and each of them moves for leave to file the petition for a writ of mandamus hereto annexed, and they and each of them further move that a rule be entered and issue directing the Honorable Edward R. Meek, District Judge of the United States for the Northern District of Texas, and directing the Circuit Court of the United States for the Northern District of Texas, to show cause why a writ of mandamus should not issue against them, and each of them, in accordance with the prayer of said petitioners, and why such petitioners should not have such other and further relief in the premises as may be just and meet.

CARDEN, STARLING & CARDEN,
Attorneys for Petitioners.
CHARLES W. STARLING,
Attorney and Counsel for Petitioners.

In the Supreme Court of the United States.

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The Application of Mary Dunn, in her own behalf, and as next friend of Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, minors, and Amanda Dunn, for a writ of mandamus against the Honorable Edward R. Meek, District Judge of the United States for the Northern District of Texas, and against the Circuit Court of the United States for the Northern District of Texas.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The joint and several petition of Mary Dunn in her own behalf and as next friend of Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, minors, and Amanda Dunn, all of whom are residents and citizens of the United States and of the City and County of Dallas, State of Texas, and inhabitants of the Northern District of Texas, each of whom respectfully shows:

I.

That your petitioner, Mary Dunn, is a feme sole, the widow of J. J. Dunn, deceased; that the petitioners, Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, are the minor children of herself and the said J. J. Dunn, deceased; that

the petitioner, Amanda Dunn, is a feme sole, and the mother of the said J. J. Dunn; that on August 1, 1907, your petitioners filed in the Fourteenth District Court of Dallas County, Texas, a certain suit No. 3030, wherein they were plaintiffs and the Texas & Pacific Railway Company and C. W. Slayter and Carl Rasmussen were defendants.

II.

(Original Petition Filed in State Court.)

That it appeared from the original petition filed in said suit that the same was brought by the plaintiff, Mary Dunn, for herself and as next friend of her children, Walter, George, James and Aneel Dunn, to recover of the defendants damages for the death of J. J. Dunn on account of being struck and killed by a moving engine of the defendant railway company, which engine it is charged was operated by the defendant C. W. Slayter as engineer, and the defendant Carl Rasmussen as fireman, on the 15th day of July, 1907, at or near the intersection of Pacific Avenue and Race Street in the City of Dallas, Texas. Amanda Dunn, mother of J. J. Dunn, was joined as a plaintiff in said suit, it is alleged, merely to have her rights adjudicated, it being alleged that she received nothing from the deceased in the way of pecuniary aid. The amount of damages sued for in said action was $85,000.00. Plaintiffs in their petition allege that they reside in Dallas County, Texas, of which county and state they are each and all citizens, inhabitants and residents, and that the defendant Texas & Pacific Railway Company is a corporation, duly incorporated, with an office and local agent in said Dallas County, Texas; that the defendant C. W. Slayter is a resident, a citizen, and an inhabitant of Harrison County, in the State of Texas, of which state he is a citizen; and that the defendant Carl Rasmussen is a resident, a citizen and an inhabitant of Harrison County, in the State of Texas, of which state he is a citizen; that each of said defendants Slayter and Rasmussen

are to be found in Dallas County, Texas; that the said J. J. Dunn was killed directly and proximately as is more fully hereinafter alleged, through the negligence of the defendants; that the defendants were guilty of negligence in permitting and causing said engine and train to run into, against and over the said J. J. Dunn and injure him so that he was instantly killed; that the defendants were negligent in that it was usual and customary for the said train and other west bound trains to use the north main track, but on this occasion they used the south main track without giving any warning by blowing of whistle or ringing of bell or making other loud noise that they were on said track; that the defendants were guilty of negligence in violating a certain city ordinance of the City of Dallas which provides that it shall not be lawful to conduct, run or cause to be run, within the city limits of said city, any railway engine or car at a speed greater than seven (7) miles per hour, the plaintiffs charging that the defendants operated said train at the time the said J. J. Dunn was hit by said engine, at a speed greater than seven (7) miles per hour, and at the high and unlawful and dangerous speed of, to-wit: twenty-five miles per hour; that the defendants were guilty of negligence in that they conducted, ran and caused to be run, the said train at said time and place without ringing any bell, in violation of the city ordinance of said City of Dallas requiring the ringing of a bell upon an engine or locomotive all the time the said engine or locomotive was in motion in the said City of Dallas, and that they were guilty of negligence in that they violated the requirements of Article 4507, Sayles' Texas Civil Statutes, requiring the whistle upon such locomotive to be blown and the bell to be rung at a distance of at least eighty rods from the place where the railroad shall cross any public road or street, and requiring that said bell shall be kept ringing until it shall cross such public road and street; and that they were guilty of negligence in that they failed to exercise ordinary care to lookout or keep a lookout for said J. J. Dunn and

failed to exercise ordinary care to avoid and keep from injuring him; that they were guilty of negligence in that they ran and moved the said train at a high and unlawful rate of speed and thereby failed to keep the said train under their control at a time and place when they should have anticipated and expected, and did anticipate and expect, the presence of said J. J. Dunn and others: that said defendants were guilty of negligence in that they failed to give the said J. J. Dunn any warning or notice of the approach of said train and failed to exercise ordinary care so to do: that they were guilty of negligence in that the said J. J. Dunn was unawares of the approach of said train and had no notice or warning of the same, and the defendants each and all knew that he was unawares of the approach of said train and had no notice or warning of the same: that said defendants were guilty of negligence in that they failed to move said train at a slow and careful rate of speed so that when they discovered or by the exercise or ordinary care ought to have discovered the said J. J. Dunn, they could have stopped said train and could have warned said J. J. Dunn of the approach of said train, and thereby have avoided the injury which resulted in his death: that the said defendants were guilty of negligence in that at the time and place of said injury the said J. J. Dunn occupied a position of imminent peril which was discovered by said defendants, and after such discovery the defendants could have reduced the speed of said train and could have stopped the same, and could have avoided the injury which resulted in the death of said J. J. Dunn, yet they failed so to do, and failed to exercise ordinary care so to do, but negligently caused and allowed said train to run over and into and collide with the said J. J. Dunn and kill him as aforesaid, and that each and all of said acts of negligence of said defendants proximately caused the injuries which produced his said death and proximately caused his said death.

III.

Your petitioners further show that each and all of the defendants were duly served with citation to appear in said court and answer said petition; that within the time required by law each and all of said defendants joined in a petition to remove said cause from said District Court to the Circuit Court of the United States for the Northern District of Texas, and presented their joint and several bond for such removal; that said petition for removal is as follows:

(Petition for Removal.)

"Mrs. Mary Dunn et al vs. The Texas & Pacific Railway Company et al. No. 3030.	In the District Court of the Fourteenth Judicial District of Dallas County, Texas.

The petition of The Texas & Pacific Railway Company, in which it is joined by defendants, C. W. Slayter and Carl Rasmussen, respectfully shows to the Court:

FIRST: That The Texas & Pacific Railway Company was and is a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act to incorporate The Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas and Pacific Railway Company."

SECOND: That the above entitled action was commenced in the above named Court on the 1st day of August, 1907, and citation issuing therein was served upon defendant, The Texas & Pacific Railway Company, on the 5th day of August, 1907, and on the other defendants on the 6th day of August, 1907, which citation is returnable on the second Monday in September, 1907, it being the 9th day of September, and defendants

are not, and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of the plaintiff before the 10th day of September, 1907.

THIRD: That the matter in dispute in this case exceeds, exclusive of interest and cost, the sum of Two Thousand Dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, Mrs. Mary Dunn, for herself and as next friend for her children, Walter, George, James and Ancel Dunn, to recover of defendants damages for the death of J. J. Dunn on account of being struck and killed by a Texas & Pacific engine, operated by C. W. Slayter as engineer and Carl Rasmussen as fireman on the 15th day of July, 1907, at or near the intersection of Pacific Avenue and Race Street, in the City of Dallas, Texas. Amanda Dunn, mother of J. J. Dunn, is joined by plaintiff merely to have her rights adjudicated, it being alleged that she received nothing from deceased in the way of support or pecuniary aid. The amount of damage claimed is Eighty-five Thousand ($85,000.00) Dollars. It is alleged that defendants are guilty of negligence in exceeding the speed limit allowed by the city ordinance and in failing to sound signals as required by law and in failing to stop the train after the danger of the said J. J. Dunn was discovered as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action. That this suit against defendant, The Texas & Pacific Railway Company, is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of said defendant, and under which it was incorporated; that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled "An Act to incorporate The Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and Acts amendatory thereof and

supplemental thereof, approved respectively of May 2, 1872, March 3, 1873, and June 22, 1874.

FOURTH: That the above entitled action is a civil suit arising under the laws of the United States, of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by Act of Congress approved March 3, 1887, to-wit: An Act entitled, "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes,' " and the Acts of Congress approved August 13, 1888, entitled "An Act to correct the enrollment of an Act approved March 3, 1888, 'An Act to amend Sections 1, 2, 3 and 10 of an Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes,' approved March 3, 1875."

FIFTH: Your petitioners further present that defendants, C. W. Slayter and Carl Rasmussen, the engineer and fireman respectively of the train alleged to have caused the death of J. J. Dunn, were, and are, men of very moderate estate and are unable to respond in damages, and in the operation of said train simply acted under orders from their superior, The Texas & Pacific Railway Company, and said company, and it alone, is solely responsible and accountable for any and all damages that may have resulted to the plaintiff, if any one is liable at all, and said defendants, C. W. Slayter and Carl Rasmussen, are not and were not guilty of any of the wrongs and acts of negligence set up and complained of in the plaintiff's petition against them, and each and all of said allegations are falsely and fraudulently made for the purpose of avoiding the removal of this case and defrauding the Circuit Court of the United States of its right for jurisdiction herein under this application and accompanying bond.

Your petitioners herewith present and file good and suffi-

cient bond conditioned that they will enter and file in the Circuit Court of the United States for the Northern District of Texas, on the first day of its next session, a copy of the record in this section, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioners therefore pray the said Court to accept said petition and bond, and to remove this cause to the Circuit Court of the United States for the Northern District of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RY. CO.

C. W. SLAYTER.

CARL RASMUSSEN.

By FLIPPEN & McCORMICK, Attorneys."

The State of Texas,

County of Dallas.

E. W. Tower, being duly sworn, says that he is the agent of The Texas & Pacific Railway Company, being the assistant auditor of said company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

E. W. TOWER.

Sworn to and subscribed before me, this the 6th day of September, A. D. 1907.

FREEMAN HALL,

Notary Public, Dallas County, Texas.

IV.

(Objections to Removal Filed in State Court.)

That thereupon your petitioners as plaintiffs in said cause filed in said District Court of Dallas County, their objections to the removal of said cause to the said Circuit Court of the United States, which objections, so filed, are as follows:

"Mrs. Mary Dunn et al vs. Texas & Pacific Railway Company et al. } No. 3030. } In the District Court for the Fourteenth Judicial District of Texas, Dallas County.

To Said Honorable Court:

Now come the plaintiffs in the above entitled and numbered cause and object to the removal of this cause upon the defendants' application to the Circuit Court of the United States for the Northern District of Texas, for the following reasons:

(1) Because plaintiffs have not the right to bring this suit in said Circuit Court of the United States for the Northern District of Texas.

(2) Because plaintiffs have not the right to bring this suit against the defendants, Slayter and Rasmussen, in the Circuit Court of the United States for the Northern District of Texas.

(3) Because plaintiffs have not the right to bring this suit against the defendant, Texas & Pacific Railway Company, in the Circuit Court of the United States for the Northern District of Texas.

(4) Because it appears from the plaintiffs' petition that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of either of the defendants, Slayter or Rasmussen.

(5) Because it appears from the plaintiffs' petition that this cause is not removable to the Circuit Court of the United

States for the Northern District of Texas at the instance of the defendant, Texas & Pacific Railway Company.

(6) Because it appears from the plaintiffs' petition that this suit is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of all of the defendants herein.

(7) Because it appears from the defendants' petition for removal that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of either of the defendants, Slayter or Rasmussen.

(8) Because it appears from the defendants' petition for removal that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of the defendant, Texas & Pacific Railway Company.

(9) Because it appears from the defendants' petition for removal that this suit is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of all of the defendants herein.

Wherefore plaintiffs pray that this cause be not removed to the Circuit Court of the United States for the Northern District of Texas, but that jurisdiction thereof be retained by this Court.

CARDEN, STARLING & CARDEN,

Attorneys for Plaintiffs."

V.

(Order of State Court Denying Removal.)

That thereupon the said District Court entered an order denying such petition to remove, which order is as follows:

"Mrs. Mary Dunn et al
No. 3030. vs. } Tuesday, September 10, 1907.
The Texas & Pacific Railway Company et al. } Entered as of Sept. 9, 1907.

This cause coming on to be heard upon the joint petition of The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusser to remove the same to the Circuit Court of the United States for the Northern District of Texas, and said petition being heard by the Court, and it appearing to the Court that the petition is in all things regular and filed in due time, and that a good and sufficient bond has been filed, but that said petition does not show proper grounds for removal, the prayer of the said petitioners, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmussen, for an order of removal of said cause to the Circuit Court of the United States for the Northern District of Texas is denied, to which order defendants except."

VI.

(Motion to Remand.)

Your petitioners further show that within the time required by law, to-wit: January 13, 1908, the defandants filed in the office of the Clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas, a copy of the record in such suit, where the same was numbered 2493, law; that on January 20, 1908, and before any other or further proceedings were had in said cause in the said Circuit Court of the United States for the Northern District of Texas, plaintiffs filed in said Court their motion to remand said cause, which motion is as follows:

"In the Circuit Court of the United States
For the Northern District of Texas,

At Dallas.

Mary Dunn et al
vs.
Texas & Pacific Railway Company et al.
} Plaintiffs' Motion to Remand.

Now come the plaintiffs in the above entitled cause by their atorneys, Carden, Starling & Carden, and appearing specially for the purpose of this motion only, saving and reserving any and all objections which they and each of them have to the manifold imperfections in the mode, manner and method of removal papers, and expressly denying that this Court has jurisdiction of this cause, or of the plaintiffs or any of the plaintiffs therein, respectfully move the Court to remand this cause to the District Court of the County of Dallas, State of Texas, for the Fourteenth District, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this Court, as appears from the following:

1. The defendants in this cause seek to remove the same because the suit arises under the laws of the United States, in that the Texas & Pacific Railway Company is incorporated under certain Acts of Congress. It does not appear from the record, and particularly from the petition to remove said cause, that any of the defendants are inhabitants of the Northern District of Texas, neither is there any denial in the record by any of the defendants of the allegation contained in plaintiffs' petition, that the defendants, Slayter and Rasmussen, are inhabitants of Harrison County, Texas, which county is in the Eastern District of Texas.

2. It appears upon the face of the record herein, that there is no separable controversy, as to either of the defendants herein, and that this suit as to the defendants, Slayter and Rasmussen, does not involve a federal question, neither does it appear from the petition to remove the cause, that the said defendants, Slayter and Rasmussen, are citizens of any state other than the State of Texas, nor is there any allegation in such petition denying the allegation in plaintiffs' petition that they are citizens of the State of Texas, and that they are citizens of the same state of which plaintiffs are alleged to be citizens.

3. It appears upon the face of the record herein that there is no separable controversy as to any of the defendants, and it does not appear from the petition to remove said cause, that each and all of said defendants are inhabitants of the Northern District of Texas; but, on the contrary, it appears from plaintiffs' petition that two of them, to-wit: Slayter and Rasmussen, are inhabitants of the Eastern District, which averment in said petition is not denied by any of the defendants.

4. It does not appear upon the face of the record herein that plaintiffs' petition alleges any cause of action arising under the Constitution or Laws of the United States.

5. It appears upon the face of the petition to remove this cause, that the allegations of fraudulent misjoinder of the parties defendant do not show any acts or facts showing fraud, but simply state conclusions of said defendants, and that therefore the said allegations, to-wit: those contained in the fifth paragraph of said petition, are immaterial and irrelevant and constitute no grounds upon which a right to remove can be predicated.

6. The plaintiffs say that they are each and every one of them citizens of the State of Texas and inhabitants of the Northern District of Texas; that the defendants, Slayter and Rasmussen, are each citizens of the State of Texas and that each is an inhabitant of the Eastern District of Texas, and that therefore the said defendants can not be sued by the plaintiffs in the Circuit Court of the United States for the Northern District of Texas, and that consequently neither of said defendants have any right to remove said cause to this Court, and that consequently said cause is not removable to this Court.

7. Plaintiffs say that the defendant, Texas & Pacific Railway Company, has its principal office and place of business in the City of New York, in the Southern District of New York, in the State of New York, of which district it is an inhabitant, and that it is not an inhabitant of the Northern

District of Texas, and that it can not be sued by plaintiffs in the Northern District of Texas, by reason of its being a federal corporation, consequently it has not the right to remove this cause to the Circuit Court of the United States for the Northern District of Texas.

8. The plaintiffs deny the averments contained in the petition of removal, wherein it is alleged that each and all of the acts of negligence of the defendants, Slayter and Rasmussen, contained in the plaintiffs' petition, are falsely and fraudulently made for the purpose of avoiding the removal of this case and defrauding the Circuit Court of the United States of its right of jurisdiction herein. Plaintiffs allege that the said defendants, Slayter and Rasmussen, were guilty of the wrongs and acts of negligence set up and complained of in plaintiffs' petition against them, and aver that each and all of said allegations are made in good faith, for the purpose of obtaining a judgment against said defendants, by reason of said wrongs and acts of negligence. They, however, aver that by reason of said wrongs and acts of negligence, and by reason of said defendants, Slayter and Rasmussen, being made parties defendant to this suit, that the Circuit Court of the United States for the Northern District of Texas is rightfully deprived of jurisdiction of this cause, and that by reason thereof there is no right to remove the same to this Court.

Wherefore plaintiffs say that the cause is not one within the original jurisdiction of this Court, and that this Court can not acquire jurisdiction by removal, and that the said cause should be remanded to the District Court of Dallas County, Texas, and plaintiffs pray that said cause be so remanded.

CARDEN, STARLING & CARDEN,

Attorneys for Plaintiffs."

VII.

(Answer to Motion to Remand.)

Thereupon the defendants in said cause filed the following answer to plaintiffs' motion to remand said cause:

"Mary Dunn et al
v.
The Texas & Pacific Railway Company et al. } No. 2493, Law.

Now come defendants, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmussen, and in answer to the motion to remand, filed herein by the plaintiffs, they say:

FIRST: That the said motion to remand is insufficient in law and shows no sufficient cause why said suit should be remanded.

SECOND: Further replying to plaintiffs' motion to remand, defendants say:

(1) That said petition for removal recites that this is a civil suit of which the Circuit Court for the Northern District of Texas has been given jurisdiction, one of the essential elements of which would be residence of the removing defendant, and defendants says that The Texas & Pacific Railway Company is a resident and has its domicile in this district, and this they are ready to verify. The defendants, Slayter and Rasmussen, were jointly sued with The Texas & Pacific Railway Company, a resident of this district, at Dallas, Dallas County, within this district, said suit being instituted in a State Court under and by virtue of the venue laws of the State of Texas, and such joinder in said suit made this the Court of the proper district for the purpose of removal.

(2) No claim of separable controversy or diverse citizenship, but only the existence of a federal question as to all of said defendants is involved in this removal, and, therefore, the second ground of the plaintiffs' motion is not applicable.

(3) The grounds of said motion to remand, as set out in the third paragraph thereof, involve the same question as presented in the first grounds to which defendants have made reply above.

(4) In reply to the fourth ground defendants says that the Court will take judicial knowledge of the federal character of the defendant, The Texas & Pacific Railway Company, the record shows the joint liability charged as against the other defendants, which in law raises a federal question as to all of said defendants.

(5) Replying to the sixth ground of plaintiffs' motion, defendants say that the citizenship of the defendants, so far as it affects the jurisdiction of the subject matter is immaterial, since the federal question that affects The Texas & Pacific Railway Company extends to the other defendants when jointly sued with it and jurisdiction is not dependent upon diverse citizenship.

(6) Replying to the seventh ground, the plaintiffs do not charge in their petition that the principal office of The Texas & Pacific Railway Company is in the City of New York, in the Southern District of New York, in the State of New York, and that it is an inhabitant of said district, and not of the Northern District of Texas, but said facts are charged for the first time in their said motion to remand, and are here denied by defendants, who assert that said defendant is a resident of said Northern District of Texas and has its domicile in same, and this defendants are ready to verify.

(7) Defendants further say that neither as a matter of law or as a matter of fact does there exist any sufficient reason why this cause should be remanded to the State Court and expressly deny the existence of any fact that would render the removal of this cause to this Court improper, and as to the existence of any such fact, or facts, they ask that said plaintiffs be required to make strict proof.

Wherefore defendants pray that said motion to remand be in all things overruled and denied.

FLIPPEN & McCORMICK,

Attorneys for Defendants."

VIII.

(Hearing and Denial of Motion to Remand.

That subsequently and before any other or further proceedings were had in said cause, the said motion to remand came on to be heard and was overruled and denied by the said Circuit Court of the United States, Honorable Edward R. Meek, District Judge, sitting as Judge of said Court.

Your petitioner further shows that at the hearing upon said motion to remand, certain testimony of L. S. Thorne, first vice-president of The Texas & Pacific Railway Company, was introduced by plaintiffs and a bill of exceptions reserved to the action of the Court overruling and denying such motion. All of said testimony was incorporated in said bill of exceptions as appears therefrom. A correct copy of said bill of exceptions is hereto attached and marked "Exhibit A."

IX.

(Cause Pending in Both Courts.)

Your petitioners further show that no other or further proceedings have been had in said cause in the Circuit Court of the United States for the Northern District of Texas, except that the same was continued at the last term of said Court, but said cause stands upon the docket of said Court subject to call at the next term thereof; that the defendants, after the District Court of Dallas County, Texas, denied their application to remove said cause to the Circuit Court of the United States, and before applying for an injunction, filed their respective answers in said Court, and the said cause now

stands upon the docket of said State Court subject to call and disposition, and your petitioners were preparing to, and intended to, prosecute the same when enjoined therefrom as hereinafter set forth.

X.

(Defendants' Bill Asking for Injunction.)

Your petitioners further show that the defendants in said cause, as complainants, on March 25, 1908, filed their bill in equity in the Circuit Court of the United States for the Northern District of Texas, at Dallas, against your petitioners as defendants, setting up in said bill the several proceedings had in said State Court, and in the Circuit Court of the United States as set forth in this petition, except the hearing of the motion to remand, which said motion had not then been heard; that in said bill of complaint the complainants charged that these petitioners were then prosecuting said original suit in the District Court of Dallas County as if no removal of said cause had ever been had, and that such continued prosecution of such suit was an unwarranted harassment of said complainants and was subjecting them to additional and unnecessary costs, and that said suit then being prosecuted in the said State District Court was vexatious and unnecessary and had no lawful status, and was in derogation of the rights of complainants and was a willful refusal on the part of the plaintiffs in said cause to recognize the jurisdiction of the Circuit Court of the United States for the Northern District of Texas, or to abide its decision as to its own jurisdiction, and that the further prosecution of said suit in the State Court at that time was contrary to equity and good conscience; and the complainants prayed that a writ of injunction would issue out of and under the seal of the Circuit Court of the United States for the Northern District of Texas enjoining and restraining your petitioners from further prosecuting their said suit in said District Court of Dallas County,

Texas, as long as this cause shall be rightfully upon the docket of said Circuit Court of the United States or until said Circuit Court shall order that the same shall be remanded to the said State District Court, and that such injunction be made perpetual.

XI.

(Order Granting Injunction.)

Your petitioners further show that upon the same date, March 25, 1908, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, upon considering the foregoing bill of complaint, signed an order referring to said State Court suit, embracing the following language:

"Now, therefore, it is ordered that you, the said Mrs. Mary Dunn, for yourself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, and said minor children themselves, defendants herein, your agents, servants and attorneys and all persons acting by or under your authority or direction, or in your behalf, be, and you are hereby, specially restrained and enjoined from further in any manner prosecuting in the Fourteenth District Court of Dallas County, Texas, your cause of action now pending on the docket of said Court against The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmussen, the complainants herein, until the further order of this Court."

XII.

(Denial of Motion to Dissolve Injunction.)

Your petitioners further show that subsequently, on May 18, 1908, they filed a motion to dissolve said injunction, and that such motion was heard after the motion to remand the said suit at law was overruled and denied, and that at such

hearing the Honorable Edward R. Meek, sitting as Judge of the United States Circuit Court for the Northern District of Texas, at Dallas, denied said motion to dissolve said injunction, and the said injunction was continued and is now in full force and effect.

XIII.

(Mandamus Only Adequate Remedy.)

Your petitioner further shows that by the ordinary remedy of appeal from final judgment of the Circuit Court of the United States in said suit at law, it may be and probably will be several years before the question whether the said Court should have retained jurisdiction of said cause, can be considered and determined by this Honorable Court; that your petitioners will be put to great expense, trouble and delay in prosecuting the said suit in the Circuit Court, all of which your petitioners believe to be unnecessary by reason of the lack of jurisdiction of said Circuit Court; that in the meantime your petitioners are powerless by reason of the aforesaid injunction, to prosecute the said cause in the State Court; that the said cause, while remaining upon the docket of the State Court, may, upon the said Court's own motion, be dismissed for want of prosecution, and the right of your petitioners to prosecute said suit, in case the same should be subsequently remanded to said Court, be put in jeopardy, if not destroyed; that there are many witnesses whose testimony is material which your petitioners desire to use upon the trial of said cause; that during the time the said cause is pending in the Circuit Court of the United States and on appeal therefrom, many of said witnesses may become, and your petitioners fear that they will become inaccessible by reason of sickness, death or removal, and your petitioners further show that by reason of such injunction they can not perpetuate the testimony of said witnesses by deposition taken in said State District Court cause, and that by reason of all of these

facts and circumstances your petitioners have no remedy unless this Honorable Court interferes by the writ of mandamus.

XIV.

(Prayer.)

Wherefore your petitioners pray that a rule be made and issue from this Honorable Court directed to the said Honorable Edward R. Meek, District Judge of the United States for the Northern District of Texas, and directing the said Circuit Court of the United States for the Northern District of Texas to show cause why writ of mandamus should not issue commanding the said Judge and the said Court and each of them to remand said suit at law to the District Court of Dallas County, Texas, and to desist from exercising any further jurisdiction in said suit except the entering of an order remanding said suit, and for such other and further relief in the premises as shall seem just and meet, and your petitioners will ever pray.

CARDEN, STARLING & CARDEN,

Attorneys for Petitioners.

CHARLES W. STARLING,

Attorney and Counsel for Petitioners.

State of Texas,
County of Dallas.

I, C. W. Starling, being duly sworn, depose and say that I am one of the attorneys for the above named petitioners; that I have read the foregoing petition; that I have personal knowledge of all the proceedings which have been had in the several courts and in the several suits mentioned in said petition, and of the facts therein referred to, and that the statements made in said petition are true, and the copies of original documents

mentioned therein are true and correct copies of such originals, and that the excerpts therefrom and narratives thereof are true and correct, and are as affiant verily believes full and complete as to all material matters.

C. W. STARLING.

Subscribed and sworn to before me this 25th day of September, A. D. 1908.

B. B. HEMPHILL,

(Seal) Notary Public, Dallas County, Texas.

EXHIBIT A.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS,

AT DALLAS.

Mary Dunn et al
vs.
Texas & Pacific Railway Company et al.
} No. ————————

Be It Remembered: That on this, the 23rd day of May, 1908, at the May, 1908, term of this Court, begun and holden in Dallas, in and for the Northern District of Texas, before the undersigned District Judge, there came on to be heard the plaintiff's motion to remand this cause to the District Court of Dallas County, Texas, from whence it had been removed by the defendants herein; and thereupon the plaintiff offered L. S. Thorne as a witness, who, being duly sworn, testified as follows:

Direct Examination.

(By Mr. Starling.)

Q. Your name is L. S. Thorne?

A. Yes, sir.

Q. You live here in Dallas, do you?

A. Yes, sir.

Q. And you are first vice-president of The Texas & Pacific Railway Company?

A. I am senior vice-president. For many years my title was first vice-president, but some two years ago—I think it was about that long, they did away with the—they changed the title. I am senior vice-president now.

Q. How long have you been first vice-president and senior vice-president?

A. Twelve or fifteen years, I would say.

Q. Who is the president of the Texas & Pacific?

A. George J. Gould.

Q. Where does he reside?

A. New Jersey; I think he claims his residence—Lakewood.

Q. Who is the secretary and treasurer?

A. C. E. Satterlee.

Q. Where does he reside?

A. New York.

Q. The Texas & Pacific Railway Company maintains an office in New York City, does it not?

A. Yes, sir.

Q. What is the number, the street and number in which the office is maintained?

A. 190 Broadway.

Q. Who is the custodian of the by-laws of The Texas & Pacific Railway Company?

A. Well, each of the—these offices here in Dallas, the secretary and treasurer; in fact, all of the officers of the road have a copy of the by-laws.

Q. Have you a copy of them with you?

A. Yes, sir.

Q. Is there a by-law that fixes the place of holding the meetings of the directors and stockholders of The Texas & Pacific Railway Company?

A. There can—perhaps without—maybe I can give you the information that you want in a litlte different way, if you will permit me, not answering your question as it is put. Our annual meetings are held the third Wednesday in March—

Q. Is there a by-law that fixes the place?

A. I think so.

Q. Will you turn to that by-law?

A. Might I answer that question possibly in a little different way; I might answer it better if you will permit me to depart a little from the question just as it is asked, and still give you—

Q. I have no objection.

A. Our annual meetings and for many years have been called in New York; then they adjourn to meet in Texas, and whatever action is taken at the New York meeting, under our rules, have to be ratified and confirmed by the annual meeting at Dallas. That has been the custom for many years.

Q. Have you a by-law that covers that matter?

A. Yes; I think I can turn to it.

Q. Turn to it, please, and read it to the Court.

A. (Witness reads) "Section 1. The annual meeting of the stockholders of this company for the transaction of such business as may legally come before them, shall be held at the office of the company, in the City of New York, on the third Wednesday in the month of March, in each year."

Q. Is there any other by-law bearing upon that question?

A. (Witness reading) "Special meetings of the stockholders of this company may be called by the president, or in his absence, or in case of his incapacity to act, by the vice-president, or by the board of directors, at any time, to be held in the office of the company, in New York, or in such other place as they may lawfully meet, upon the usual notice of fourteen days."

Q. Is there any other by-law bearing upon that question of where they shall meet?

I. I don't think so. I am not quite positive. It is all here. I have glanced over it hurriedly.

Q. Now, Mr. Thorne, who is the custodian of the stock register and stock book of the Texas & Pacific?

A. The secretary, Mr. Satterlee. Our transfer book is kept in New York, but we have an assistant secretary here who receives stock, has it registered, etc.

Q. But the principal stock book is kept in New York?

A. The transfer—stock book is kept in New York by Mr. Satterlee; like nearly all large corporations in this country, they keep their transfer book in the City of New York.

Q. And you say you have an assistant secretary here?

A. Assistant secretary and treasurer; yes, sir.

Q. Who is that?

A. Mr. Lewis S. Smith.

Q. And he also keeps a stock book here?

A. No, sir. As I stated, the transfer book is kept in New York. He has his record here, and receives stock here to be registered—sends it to New York to be registered.

Q. The transfer book is in New York, in the custody of Mr. Satterlee?

A. Yes, sir.

THE WITNESS: Can I say only one word that maybe may be helpful to you?

MR. STARLING: I have no objection.

THE WITNESS: For many years the corporation has designated Dallas as the general office of this company, and I wish to refer you to any of our annual reports. The office of the company is designated this way: "General Offices, Dallas, Texas. New York office, 195 Broadway, New York."

Q. That is to the same effect that you have it here on your time cards, is it? It says here: "General Offices, New York, N. Y., Dallas, Texas." (Showing witness paper.)

A. I don't remember; but here is a copy—

MR. STARLING: We have no objection. Have you any, Mr. Hall?

MR. HALL: None at all.

THE WITNESS: The literature, practically all of it, has "General Offices, 195 Broadway and Dallas, Texas." Whenever it would be referred to in any of our annual reports, and any official papers you find it, the Dallas office is designated as the general office.

Q. That is, just as it is here?

THE WITNESS: I wish to make it quite clear to you, if I may be permitted to do so. Since the recent laws took effect in this territory, that our annual meting, which is called in New York, they simply meet and bring up such matters as come before them, but that meeting then adjourns—for at least fifteen years, more than fifteen years—that meeting then adjourns to meet in Dallas, Texas, where all the acts or any action taken by the New York meeting is confirmed by the Dallas meeting, before it is considered effective.

MR. STARLING: That's all.

WITNESS: Thank you.

Cross Examination

(By Mr. Hall.)

Q. Just want to ask this question, if Mr. Thorne doesn't sign up stock. Do you or do you not sign stock for the company here?

A. For quite a number of years I have signed all the stock and bonds and all official papers, but within the last few months we have a vice-president now located at 195 Broadway, and he probably would sign any stock now, if he was in this territory, or in the United States at the time they required additional stock to be signed, but that was only a few months ago. For a number of years I have signed the stock and all papers officially.

Q. Is there a seal kept here in Mr. Smith's office?

A. Yes, sir.

Q. How is it used? Is it used here?

A. It is used in any cases where a seal is necessary on any papers.

Q. Just as it would be used in New York?

A. Yes, sir.

MR. McCORMICK: Do you sign deeds and papers of that kind here in Dallas?

A. For a great many years, yes. I wouldn't say that I have always signed all deeds, but nearly all at least. Some signed by Mr. Abrams—

Q. Where is the land department of the Texas & Pacific located?

A. Dallas.

Q. And you have a resident commissioner here to attend to all land business?

A. Yes, sir; Mr. Abrams.

Q. You say you are senior vice-president; what portion

of the time do you act as president of the road?

A. As president and general manager, all of the time. Have no other business.

Q. Does the president, Mr. Gould, give his personal attention to the ordinary affairs of the corporation as conducted here in Texas?

A. Well, this is a little bit of a hard question to answer, and give you what you want to cover. Take last year, for instance; the president was out of the United States for six or eight months and all matters coming up were acted on at home.

Q. All the main operating officials are here in Dallas?

A. Yes, sir.

Q. What are the principal officers you have here?

A. All of the operating officers are here—the auditor, the general freight and passenger agents, general manager, assistant secretary and treasurer, and the rest of them.

Q. All of the active general offices of the road, except the president and secretary, are here in Dallas, are they not?

A. Yes. There is a vice-president located in New York now, but he is inactive.

Re-Direct Examination.

(By Mr. Starling.)

Q. This seal that you keep here, is that a copy of the seal that is kept in New York?

A. Yes, sir; the official seal of the company.

Q. You have two of them, then, one here one one in New York?

Q. And these stock certificates which you sign in your official capacity, they are either sent to you by the New York office and returned, or else handed to you by the assistant secretary here, and you sign them and they are subsequently tarnsmitted to the New York office?

A. Yes, sir.

Q. And you don't sign stock certificates now that they are signed by the other vice-president in New York?

A. I want to answer the question just as it is asked me. I made that broad enough that if he was in New York, and he was there, possibly he would sign it, but I am not certain about that. That is Mr. Huntsman, and he is the second vice-president or junior vice-president, but is also located in the general offices of the company in New York, and now as they have such an official there, if there was any new stock to be signed up, and he was there, I presume he would sign the stock. I don't know that he would.

Q. He has the authority to do so?

A. Yes; he would be authorized to.

MR. McCORMICK: You would have the same authority here, Mr. Thorne, would you not?

A. Yes.

Q. To sign any stock that was presented to you for signature?

A. Yes, sir; I have signed all of it for a great many years.

And no other or further testimony was offered by either party, and after the argument of counsel, and thereafter at a

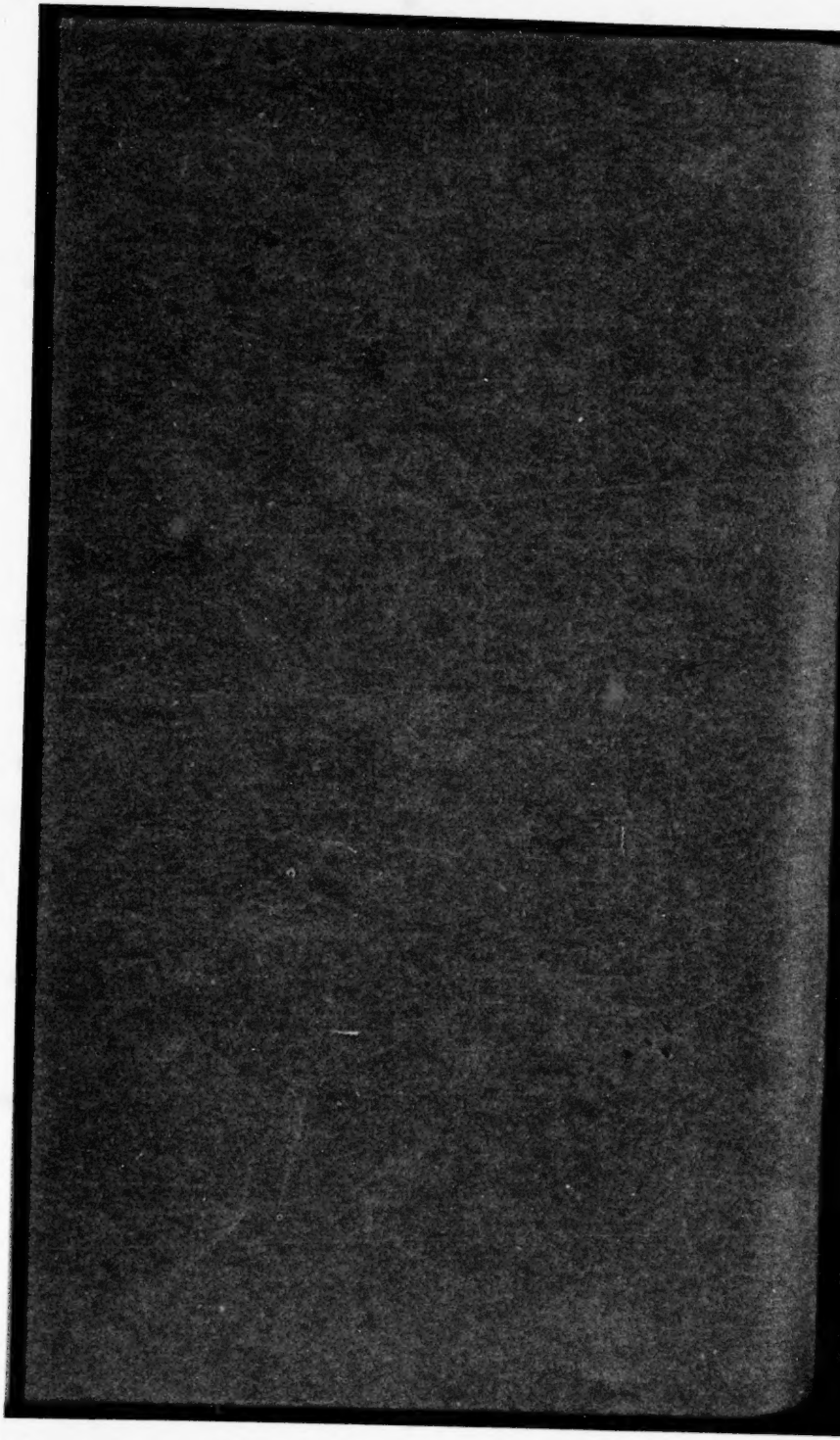
subsequent day of said term of said Court, to-wit: on May 30, 1908, the said motion to remand was overruled and the plaintiff excepted to said order of the Court overruling said motion and then and there prayed that his bill of exceptions might be sealed, and upon due consideration said bill of exceptions is sealed, approved, allowed and ordered filed as a part of the record in this case.

Dated at Dallas, Texas, this 8th day of June, 1908.

E. R. MEEK,

District Judge.

Filed June 8, 1908.



In the Supreme Court of the United States.

In the Matter

of

The Application of Mary Dunn, in her own behalf, and as next friend of Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, minors, and Amanda Dunn, for a writ of mandamus against the Honorable Edward R. Meek, District Judge of the United States for the Northern District of Texas, and against the Circuit Court of the United States for the Northern District of Texas.

MEMORANDUM FOR PETITIONERS IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS, AND IN SUPPORT OF THEIR APPLICATION FOR THAT WRIT.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

This is a motion for leave to file a petition for the writ of mandamus directing Judge Edward R. Meek of the Northern District of Texas, and the Circuit Court of the United States for the Northern District of Texas, to remand a certain suit at law from said Court to the District Court of Dallas County, Texas, whence it had been removed, and to desist from exercising any further jurisdiction in said suit except the entering of an order remanding said suit.

Petitioners are the wife, minor children and mother of J. J. Dunn, deceased; the minor children being represented by their mother, as next friend. On August 1, 1907, they brought suit in the District Court of Dallas County, Texas, against The Texas & Pacific Railway Company and C. W. Slayter and Carl Rasmussen, under Title 57, Sections 3017 to 3027 of the Revised Statutes of the State of Texas, 1895, creating a cause of action for wrongful death, charging that by reason of the joint negligence of said defendants, the said J. J. Dunn was struck and killed by a moving engine of said railway company, which engine was operated by the said Slayter as engineer and the said Rasmussen as fireman, and that said negligent killing occurred in the City of Dallas, Texas, on the 15th day of July, 1907. The amount of damages alleged in the petition is Eighty-five Thousand ($85,000.00) Dollars. Plaintiffs in their petition allege that they reside in Dallas County, Texas, of which county and state they are each and all citizens, inhabitants and residents, and the defendant, The Texas & Pacific Railway Company, is a corporation duly incorporated, with an office and local agent in said Dallas County, Texas; that the defendant, C. W. Slayter, is a resident, a citizen and an inhabitant of Harrison County, in the State of Texas, of which state he is a citizen; and that the defendant, Carl Rasmussen, is a resident, a citizen and an inhabitant of Harrison County, in the State of Texas, of which state he is a citizen.

In due time The Texas & Pacific Railway Company, joined by the other defendants, presented to the District Court of Dallas County, Texas, a petition to remove said cause from said District Court to the Circuit Court of the United States for the Northern District of Texas, and presented their joint and several bond for such removal. The petition for removal is based solely upon the fact that the Texas & Pacific Railway Company is a Federal corporation, and that the amount in controversy exceeds Two Thousand ($2,000.00) Dollars. There

is no allegation in the petition for removal showing that either of the defendants are inhabitants of the Northern District of Texas. There is an allegation therein that the defendants, Slayter and Rasmussen, were and are men of very moderate estate and are unable to respond in damages, and in the operation of said train simply acted under orders from their superior, The Texas & Pacific Railway Company, and that said company, and it alone, is solely responsible and accountable for any and all damages that may have resulted to the plaintiffs, if any one is liable at all, and that said defendants, Slayter and Rasmussen, are not and were not guilty of any of the wrongs and acts of negligence set up and claimed in the plaintiffs' petition against them, and that each and all of said allegations are falsely and fraudulently made for the purpose of avoiding the removal of this case, and defrauding the Circuit Court of the United States of its right of jurisdiction herein under this application and accompanying bond.

Thereupon your petitioners, as plaintiffs in said cause, filed in said District Court of Dallas County, their objections to the removal of said cause to the Circuit Court of the United States, which objections are based upon the propositions of law hereinafter presented in this memorandum.

Thereupon the District Court of Dallas County, Texas, approved said bond, but denied said petition to remove, and entered an order accordingly.

Thereafter, and in due time, the defendants filed in the office of the Clerk of the District Court of the United States for the Northern District of Texas at Dallas, a copy of the record in such suit, and in due time, before any other or further proceedings were had in said cause in the said Circuit Court, your petitioners, as plaintiffs, filed in said Court their motion to remand said cause, appearing specially for the purpose of such motion, only, saving and reserving any and all objections which they and each of them have to the mode, manner and method of removal papers, and expressly denying

that said Circuit Court had jurisdiction of said cause, or of the plaintiffs or any of the plaintiffs therein. Said motion is based upon the propositions of law hereinafter presented. Said motion also contained a specific denial of the alleged false and fraudulent joinder of the defendants, Slayter and Rasmussen. It also specifically charged that the defendant, The Texas & Pacific Railway Company, has its principal office and place of business in the City of New York, in the Southern District of New York, in the State of New York, of which district it is an inhabitant, and that it is not an inhabitant of the Northern District of Texas, and that it can not be sued by plaintiffs in the Northern District of Texas by reason of its being a Federal corporation. It also specifically charged that the defendants, Slayter and Rasmussen, are each citizens of Texas and inhabitants of the Eastern District of Texas, and that therefore the said defendants could not be sued by the plaintiffs in the Circuit Court of the United States for the Northern District of Texas. The defendants filed an unverified answer to said motion, alleging no new facts, except that the defendant company was a "resident" of the Northern District of Texas, and denying that it was an inhabitant of the Southern District of New York.

Subsequently, and before any other or further proceedings were had in said cause, the said motion to remand came on to be heard and was overruled and denied by the said Circuit Court of the United States, Honorable Edward R. Meek, Judge, sitting as judge of said court. Upon the hearing of said motion certain testimony was introduced and a bill of exceptions was reserved to the action of the court overruling and denying such motion. All of said testimony was incorporated in said bill of exceptions, as appears therefrom. A copy of said bill of exceptions accompanies the petition (pp. 22 to 30).

Such testimony, as appears from said bill of exceptions, was that of L. S. Thorne, the first vice-president of The Texas & Pacific Railway Company, who, as a witness, read certain by-

laws of The Texas & Pacific Railway Company, said by-laws being as follows:

"Section 1. The annual meeting of the stockholders of this Company for the transaction of such business as may legally come before them, shall be held at the office of the Company, in the City of New York, on the third Wednesday in the month of March, in each year.

"Special meetings of the stockholders of this Company may be called by the President, or in his absence or in case of his incapacity to act, by the Vice-President, or by the Board of Directors, at any time, to be held in the office of the Company, in New York, or in such other place as they may lawfully meet, upon the usual notice of fourteen days." (Petition, p. 25.)

He further testified that the stock register and stock transfer book of said company were kept in New York, in the custody of the company's secretary, Mr. Satterlee. (Petition, p. 25.) This same witness testified: "Our annual meetings and for many years have been called in New York, then they adjourn to meet in Texas, and whatever action is taken at the New York meeting, under our rules, have to be ratified and confirmed by the annual meeting at Dallas. That has been the custom for many years." (Petition, pp. 24 and 26.) That all of the operating officials of the defendant road are here in Dallas; that the principal officers here were the auditor, the general freight and passenger agent, general manager, assistant secretary and treasurer, and all of the active general officers of the road except the president and secretary and one vice-president. (Petition, p. 28.)

The defendants answered in the State Court after their application to remove was denied, and plaintiffs, until enjoined, were prosecuting said suit in said court, and said cause now remains upon the docket of each of said courts; i. e., the District Court of Dallas County, Texas, and the Circuit Court

of the United States for the Northern District of Texas.

On March 25, 1908, the defendants in said cause filed their bill of equity in the Circuit Court of the United States for the Northern District of Texas, at Dallas, against your petitioners, as defendants, setting up in said bill the several proceedings had in said State Court and in the Circuit Court of the United States, except the hearing of the motion to remand, which said motion had not then been heard, praying for an injunction restraining your petitioners from prosecuting the suit in said State Court. Upon consideration of such bill the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, on the same date granted such injunction. (Petition, p. 19.)

Subsequently your petitioners filed a motion to dissolve such injunction, and said motion was heard after the motion to remand the said suit was overruled and denied, and at such hearing the same judge denied said motion to dissolve said injunction, and the said injunction was continued, and is in full force and effect. (Petition, pp. 19 and 20.)

Your petitioners state in their petition (p. 20) that by the ordinary remedy of appeal from final judgment of the Circuit Court of the United States, in said suit at law, it may be, and probably will be, several years before the question whether the said court should have retained jurisdiction of said cause, can be considered and determined by this Honorable Court; that your petitioners will be put to great expense, trouble and delay in prosecuting the said suit in the Circuit Court, all of which your petitioners believe to be unnecessary by reason of the lack of jurisdiction of said Circuit Court; that in the meantime the said cause, while remaining upon the docket of the State Court, may, upon the said court's own motion, be dismissed for want of prosecution, and the right of your petitioners to prosecute said suit, in case the same should be subsequently remanded to said court, be put in jeopardy, if not destroyed; that there are many witnesses whose testimony

is material which your petitioners desire to use upon the trial of said cause; that during the time the said cause is pending in the Circuit Court of the United States, and on appeal therefrom, many of said witnesses may become, and your petitioners fear that they will become, inaccessible by reason of sickness, death or removal, and your petitioners further show that by reason of such injunction they can not perpetuate the testimony of said witnesses by deposition taken in said State District Court cause, and that by reason of all of these facts and circumstances your petitioners have no remedy unless this Honorable Court interferes by the writ of mandamus.

Since your petitioners have no other remedy they present their motion and petition to this Honorable Court with a view of preventing the said Circuit Court from further proceeding in said cause, except to remand the same to the said State Court. In support thereof they present the following propositions of law, authorities, and argument.

I.

Petitioners Are Entitled to the Remedy by Mandamus.

In considering several of the propositions which will be advanced herein relative to the jurisdiction of the Circuit Court of the United States, an inspection of the record made in the State Court is all that is necessary to determine the question. If upon the face of the record as made in the State Court the case was not removable, jurisdiction of the Circuit Court has not attached. Crehore v. The O. & M. Ry. Co., 131 U. S. 240. There is no preliminary question of law or of fact, as in re Pollitz, 206 U. S. 323, or as in Ex parte in the Matter of the State of Nebraska, decided April 20, 1908, reported in the L. C. Publishing Company's Advance Sheets, May 15, 1908, page 581, which calls for the exercise of judicial discretion of the Circuit Court. It is submitted that the case falls squarely within the rule laid down in Ex parte Wisner,

203 U. S. 449. In determinig some of the questions presented it may be necessary to inspect the bill of exceptions reserved upon the hearing of the motion to remand, which bill of exceptions forms a part of the petition herein and constitutes Exhibit "A" appended thereto. (Petition, pp. 22 to 30.) It will be observed from this bill of exceptions that all the testimony offered upon such hearing is incorporated in the bill (p. 29). It will further be observed that the only testimony offered was that of the witness, L. S. Thorne, a vice-president of The Texas & Pacific Railway Company, who was tendered as a witness by the petitioners herein. There is absolutely no dispute as to facts, and the only question for consideration is the effect to be given his testimony. In other words, the facts are not disputed, but the law is to be applied to the facts as this official of the defendant company details them. The reasons presented by petitioners why a writ of mandamus should be awarded herein will readily appeal to this court. The State Court retained jurisdiction of the cause under consideration, and the Circuit Court not only retains jurisdiction thereof,but enjoins further proceedings in the State Court. An appeal from a final judgment which may be rendered in this cause would be a worthless remedy if it should be ultimately decided that the Circuit Court was without jurisdiction and that the motion to remand should have been sustained. Petitioners, after having been deprived of the right to prosecute their case in the State Court for a long period of time, will then be permitted to proceed, provided the State Court has not dismissed their suit for want of prosecution. If such cause has been dismissed, and the judgment of dismissal has been passed beyond the control of the State Court, then the remanding of such cause to the State Court will not enable petitioners to again have their cause docketed, and their remedy will need to be by a new suit, provided their cause of action is not barred by the two year statute of limitation in force in Texas. If the State Court can proceed with the cause

after a remand, following an appeal, then petitioners must assume the risk of suffering loss of material testimony on account of the inaccessibility of material witnsses, whose testimony they are enjoined from taking in the State Court case. If mandamus is not awarded and the Circuit Court is without jurisdiction, the injunction granted by the Circuit Court simply permits the defendants to wrongfully stay prosecution of the State Court cause. Moreover, such injunction in effect deprives the State District Court of jurisdiction which the Supreme Court of Texas has said belongs to it, there being a conflict of views between the Circuit Court for the Northern District of Texas and the Supreme Court of Texas, in which the Circuit Court practically forces the Supreme Court to yield. As a matter of public policy, the conflict should be speedily settled.

II.

(1) **Where only one of two defendants, if sued alone, has a right, because of a Federal question affecting it, to remove a case, there being another or other defendants who if sued alone had no right of removal, such right does not exist because all defendants join in the application to remove.**

(2) **A suit against an employee of a Federal corporation, arising by reason of his conduct while in the line of duty, is not one arising under the constitution and laws of the United States, unless it appears from plaintiff's petition that the conduct in question is of such a character that it is in some manner defined or affected by Federal law.**

(3) **A suit against a Federal corporation and an individual employee instituted in good faith, arising by reason of their alleged joint negligence, is not removable to the Federal Court on account of Federal character of such corporation.**

The Supreme Court of the State of Texas has declared the three foregoing propositions of law in the case of Texas & Pacific Railway Company v. Huber, 92 S. W. 833, and Eastin

& Knox v. Texas & Pacific Railway Company, 92 S. W. 838. It is on account of these two decisions that the Texas State Court conceived it to be its duty to retain jurisdiction of the cause in question. The decision of the Circuit Court of the United States for the Northern District of Texas is at total variance with the views enunciated in these two opinions by the Supreme Court of the State of Texas. The opinion of the Supreme Court of Texas is so complete that it is difficult to amplify or enlarge upon the reasons assigned for its holding. The kernel of its opinion is found in its comments upon the opinion of Chief Justice Fuller in Chicago, Rock Island Railway Company v. Martin, 178 U. S. 245, wherein it says: "We "are of the opinion, therefore, that in the remark quoted ('That "all defendants must join in the application under either "clause'), it was not intended to imply, that where only one "of two or more defendants could have removed a case, if "sued alone, there being another or other defendants who "had no right of removal, that such right would exist pro- "vided all should join in the application." The Supreme Court of Texas also says in this opinion: "We fail to see "how a plaintiff can give jurisdiction over a cause of action "over which of itself the United States Court has no juris- "diction by injecting into it another cause of action which "that court has power to hear and determine, and we also "fail to see how a Federal court can acquire jurisdiction over "a defendant over whom it would have none, by joining him "in the suit with one over which the court has jurisdiction." There is, however, one sentence in the opinion of Chief Justice Fuller in the case of Chicago, Rock Island & Pacific Railway Company v. Martin id., which is not noticed by the Supreme Court of the State of Texas, but which strengthens the view taken by that court. It is the closing sentence in the opinion, which is: "This being so, the case came solely within the "first clause of the section, and we are of the opinion that it "was not intended by Congress that under such circumstances,

"there should be any difference between the rule applied un-
"der the first and second clauses of Section 2 of the Act of
"1887-8." This is preceded by this sentence: "Whatever
"the rights of the receivers to remove the cause, if they had
"been sued alone, the controversy was not a separable con-
"troversy within the intent and meaning of the Act." This language and the history of jurisdictional acts indicate that the Martin case was so decided, not because the receivers' co-defendant neglected or refused to join therein, but because its inability to join therein prevented it from so doing, and that the case would not have been decided differently had such co-defendant so joined. The receivers were receivers of a Federal corporation, and not a State corporation as in the case of Gableman v. Peoria P. & D. Co., 179 U. S. 339. The suit against the receivers must therefore have been a suit against a Federal corporation and consequently involved a Federal question. If these premises are correct, the Martin case establishes the proposition that a Federal corporation can not remove when sued in this class of cases jointly with a defendant who if sued alone could not remove, even if such co-defendant joins in the application for removal. The earliest act of Congress which conferred on the Circuit Court of the United States general jurisdiction of suits of a civil nature at common law or in equity "arising under the Constitution or laws of the United States" was the Act of March 3, 1875, Chapter 137, 18th Statutes at Large, 470. Under Section 2 of that Act any such suit brought in a State Court might be removed by either party into the Circuit Court of the United States. This court has repeatedly approved the following language of Chief Justice Marshall in the case of Strawbridge v. Curtis, 7 U. S., 3 Cranch 267: "The court understands these expres-
"sions (referring to the words 'suit between a citizen of the
"state where the suit is brought and the citizen of another
"state') to mean, that each distinct interest should be repre-
"sented by persons all of whom are entitled to sue or may

"be sued in the Federal Court; that is, that where the interest "is joint, each of the persons concerned in that interest must "be competent to sue or liable to be sued in those courts." In the case of Smith v. Lyon, 133 U. S. 315, this court in quoting this language said: "This construction has been ad- "hered to from that day to this, and although the statutes "have modified the jurisdiction of the court as regards the "amount in controversy, and in many other particulars, the "language construed by the court in Strawbridge v. Curtis "has been found in all of them. This statute conferring and "defining the jurisdiction of the Circuit Court of the United "States, has been re-enacted and re-cast several times since "the original decision of Strawbridge v. Curtis * * * We do "think, in the light of this long continued construction of the "statute by this court during a period of nearly one hundred "years, in which, though the statute has been the subject of "renewed legislative consideration and of many changes, it "has always retained the language which was construed in "the case of Strawbridge v. Curtis, that we are at liberty "to give that language a new meaning when it is used in "reference to the same subject matter." The only purpose of clause 3 of Section 2, was to permit a less number than all of the defendants actually interested in a separable controversy, to remove said cause when the other defendants were not entitled to remove. Its object was not to confer upon certain defendants a right to remove alone simply because others similarly situated did not join in the application. It has been uniformly held, that the provision authorizing the removal of causes under clause 2 of Section 2, only permit such removal where all the defendants have the right to remove. Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 203; Hooe v. Jamison, 166 U. S. 395. It is interesting to note that a careful research discloses no case either prior to or subsequent to the Martin case, which has been before this court wherein a defendant entitled to remove has not

joined in the application. In all cases where this court has been called upon to consider whether a removal could be had under clause 2, upon application of less than all of the defendants, there has been some one or more of the defendants who were residents of the same state as some one or more of the plaintiffs, and who were therefore not entitled to remove the cause. The opinion in the Martin case should be read in the light of this fact. It is true that in nearly all these cases language is used which indicates that this court may be of the opinion that the expression "defendant or defendants therein" in the first clause, and "defendant or defendants therein being non-residents of that state" in the second clause, mean all of the defendants, notwithstanding each may be entitled to a removal if sued alone, or upon a proper petition if sued jointly. This court, however, may conclude, when this question is presented, that the language in prior opinions has been only the reiteration of the rule in the Strawbridge case, and that the statute means that if the cause is removable, as it would be if each defendant was entitled to remove if sued alone, that it may be removed upon the application of any one or more of such defendants; and that it is not the intention of Congress to place a defendant where the exercise of a right common to all defendants is made contingent upon the willingness or unwillingness of a co-defendant to avail himself of such right. The cases decided do not preclude it from such a conclusion, unless it shall be held that the Martin case rests solely upon this ground. A careful examination of the cases decided by the Circuit Courts of Appeal also discloses no case where a defendant entitled to remove has not joined in the application. The court for the First Circuit in Miller v. Clifford, 133 Fed. 880, held that a citizen of Maine sued in Massachusetts, with other defendants, citizens of Massachusetts, by a citizen of New York, was not entitled to remove the cause on her application alone, concluding that all defendants must join, but the decision can be sustained

on the ground that the resident defendants were not entitled to remove, and therefore not entitled to join in the application for the removal, and that the non-resident defendant can not remove unless all of the defendants can remove. There is some difference of opinion between the Circuit Courts as to the necessity of all defendants joining when all are entitled to join. An opinion concluding in favor of the right of one such defendant to remove is found in the case of Mutual Life v. Champlin, 21 Fed. 85. This case was followed in the case of Garner v. Second National Bank, 66 Fed. 369, where the authorities are reviewed and attention is directed to the fact that the conflicting decisions upon this question arise from language used in opinions in cases where one defendant was not entitled to remove. This rule was also followed in Boston Company v. Mackey, 70 Fed. 801. This direct question appears never to have come before any appellate court for decision. Whether this court be of the opinion that all defendants "must" join in the application, as well as be entitled to join in the application, it is, nevertheless, the settled construction of the statute that they "must have the right to" join, and it is apparent that this construction should apply whether seeking a removal under clause one or clause two. The mere joinder of parties, who have no right to join, does not satisfy the statute. Blake v. Mckim, 103 U. S. 336. This, then, was the settled law when the Martin case was decided, and the opinion clearly appears to rest thereon rather than upon the enunciation of the principle that there was a Federal question as to both defendants, and that they would be entitled to remove upon their joint application, but not upon the application of one of them alone. If this is correct, the concluson reached in the Martin case would have been the same had all defendants joined in the application.

There is only one authority to the contrary. This is the case of Landers v. Felton, 73 Fed. 311, the opinion being by Circuit Judge Taft, where it is held that an action brought

against the receiver of a Federal corporation and other parties who are citizens of the same state as the plaintiff, to establish a joint liability of all defendants, is a suit arising under the laws and constitution of the United States. The reasoning in the opinion is, that if no separate liability can be asserted against a receiver, except by virtue of those laws, no joint liability with another can be asserted except by virtue of the same laws. This opinion was written before the decision of this court in the Martin case. The facts therein were identical with those in the Martin case. The former case was cited in the briefs of the latter, but was not followed. As in the Martin case, the application to remove was made by the receiver alone, the defendant, Southern Railway Company, not joining therein. The opinion also makes no reference to the several acts of Congress, nor to any precedents in its support. It was also written before the opinions in the cases of Western Union Telegraph Company v. Ann Arbor R. Co., 178 U. S. 239, and Gableman v. Peoria Co. id., and before the clear enunciation of the rule therein declared. It is respectfully submitted, that the joint liability of the Federal railway company with the other defendants is asserted by virtue of law not contained in the railway company's charter, or in any other Federal enactment, and that the court needs to look to the laws of the United States only for the purpose of determining whether The Texas & Pacific Railway Company can be sued jointly with another in cases of this kind, and whether it can be a party to a tort of the nature disclosed by the petition, and if a party thereto, whether it would respond in damages therefor, questions which are too frivolous to submit. The Supreme Court of the State of Texas expressed the opinion, which, from later decisions, it is also believed is the opinion of this court, that the doctrine enunciated in the Pacific removal cases should not be extended.

It is further submitted that Congress must have had in mind the principle that all defendants must be liable to be

sued in the Circuit Court, which was laid down in the Strawbridge case, when it enacted the laws of 1875 and 1887-8, and that it intended that this principle should be applied to such enactments. The fact that the Act of 1875 authorized a removal at the instance of "either party," might possibly have authorized any plaintiff or any defendant to have removed a cause presenting a Federal question as to any party, but the fact that Congress, in passing the restrictive Acts of 1887-8, substituted the words "defendant or defendants" for the words "by either party," as found in the removal section of the Act of 1875, indicates that it intended that thereafter the Federal court should have jurisdiction by reason of a Federal question only in the event each defendant, if sued alone ,would have been liable to be sued in the Federal court. It had been uniformly held that clause 3 of Section 2 applies where there are two or more controversies in the same suit, one of which was wholly between citizens of different States, and that a joint cause of action did not fall within the rule prescribed by this clause. Hanrick v. Hanrick, 153 U. S. 192; Torrence v. Shedd, 144 U. S. 527; Whitcomb v. Smithson, 175 U. S. 635. In the case of Blake v. McKim, 103 U. S. 336, the defendants, one a citizen of New York and the other two citizens of Massachusetts who being sued in the State court of Massachusetts by a citizen of that State, sought to remove the suit to the Federal court upon their joint petition; this petition was denied by this court, and in so doing the following language was used: "The contention upon the part of counsel "for the executors is that the suit is removable upon their "joint petition under the first clause of the second section "of the Act of 1875. We are unable to concur in that view. "There is, undoubtedly, some ground for such construction, "but we are not satisfied that Congress intended to enlarge "the jurisdiction of the Circuit Courts to the extent that con-"struction would imply." If the proposition therein contended for had been established, the rule would have then

been that a cause, even if there were only one controversy therein, might be removed upon the joint application of all the defendants, although some of such defendants, if sued alone, were not entitled to such removal. This is exactly the proposition for which the defendants in the case in question contend ,and they thereby seek to apply a different rule to cases removed under clause one than to cases removed under clause two.

The Supreme Court of Texas in the case of Texas & Pacific Railway Company v. Huber id., also discussed and enunciated the proposition, that a Federal question was not raised as to both defendants jointly, or as to the engineer, because the latter was charged with negligence which is alleged to have occurred in the discharge of his duty. Of course, it is conceded that a plaintiff might charge an employee as defendant with a line of conduct which was authorized, controlled, permitted or required by an Act of Congress, and seek a recovery by reason of such conduct, and that in this event a Federal question would be raised, but otherwise not. The language of this court, in Gableman v. Peoria D. & E. Co., id., defines the law. It is there said in the language of previous opinions, "that when a suit does not really and substantially involve a "dispute or controversy as to the effect or construction of the "constitution or laws of the United States upon the deter-"mination of which the result depends, it is not a suit arising "under the constitution or laws. And it must appear on the "record by a statement in legal and logical form, such as is "required in good pleading, that the suit is one which does "really and substantially involve a dispute or controversy "as to a right which depends on the construction of the con-"stitution or some law or treaty of the United States, before "jurisdiction can be maintained." There is nothing in the Act of Congress incorporating The Texas & Pacific Railway Company, or in any other Federal law, which in any way prescribes or affects the duty of engineers or of firemen, or which

affects the conduct referred to in the petition. The case is similar to that of Chicago, Rock Island & Pacific Railway Company v. Martin, id., where the receiver was not only an officer of the Federal court, but was the receiver of a Federal corporation, and where it is said: "This was an ordinary ac-"tion under a State statute for wrongfully causing the death "of plaintiff's intestate. No Federal question was in fact "presented by the pleadings nor litigated at the trial. The "liability depends on principles of general law applicable "to the facts ,and not in any way upon the terms of the order "appointing the receiver." The case at bar was an ordinary action under a State statute for wrongfully causing the death of J. J. Dunn. No Federal question is, in fact, presented by the pleadings and none can be litigated at the trial. The liability depends upon principles of general law applicable to the facts and not in any way upon the language of the charter, or any other act of Congress, pertaining to the incorporation, management or control of The Texas & Pacific Railway Company.

It is submitted that the petition for removal in this case does not tender the issue of a fraudulent joinder of the engineer and fireman. Paragraph five of the application (Petition, p. 7), contains the only allegations covering this point. They in effect are: That the engineer and fireman were men of moderate means and unable to respond in damages; that in the operation of said train they simply acted under the orders of the company, and that the company and it alone is solely responsible and accountable for any and all damages that may have resulted, and that the said Slayter and Rasmussen are not and were not guilty of any wrongs and acts of negligence set up in the plaintiff's petition against them, and each and all of their said allegations are falsely and fraudulently made for the purpose of avoiding the removal of the case. A similar petition was passed upon by the Supreme Court of Texas, in the case of Eastin & Knox v. Texas

& Pacific Railway Company, id., and it was there held that the allegations were simply conclusions of law. To the same effect is the case of Offner v. Chicago E. & R. Co., Seventh Circuit, 148 Fed. 201, when the petition for removal charged that the resident defendant "was not a party to the alleged negligence." There is no allegation that these defendants were not the engineer and fireman respectively of said engine. If the application had contained such an allegation, followed by the allegation that their joinder was fraudulent for the purpose indicated, there would have been an issue of fact to have been submitted to the Circuit Court, but the fact that they were poor and unable to respond in damages, or that they were acting under instructions from their superior, or that they denied the wrongs and acts of negligence charged in the petition, constitutes no ground for an allegation of fraud. In the event the issue of fraud was tendered by the petition to remove, it appears by the bill of exceptions taken upon the hearing of the motion to remand, that such issue was waived by the removing party, as no evidence of any character was introduced in support thereof. The only testimony was relative to the inhabitancy of The Texas & Pacific Railway Company. It is well settled that a petition for removal must allege, and that it must be proven, that defendants were wrongfully made joint parties for the purpose of preventing removal. L. & N. Company v. Wangelin, 132 U. S. 599; Albany G. S. R. Co. v. Thompson, 200 U. S. 216.

III.

If The Texas & Pacific Railway Company is an inhabitant of the Southern District of New York, suit against it can not, except by its consent, be maintained in the Circuit Court for the Northern District of Texas, provided jurisdiction is dependent solely upon a Federal question, and therefore such company as defendant can not remove a case from the State court to such Circuit Court over the objection of the plaintiffs.

This proposition is sustained by the following authorities:

Ex parte Wisner, 203 U. S. 449.

In re Keasbey & Mattison Co., 160 U. S. 219.

Wolf v. C. O. & G. Ry. Co., 133 Fed. 601.

Sunderland Bros. v. C. R. I. & P. Ry., 158 Fed. 878.

From these authorities is it clear that if petitioners had brought their suit in the Circuit Court of the United States for the Northern District of Texas and had not so framed their petition as to confer jurisdiction by reason of diverse citizenship, a plea to the jurisdiction interposed by the railway company, supported by proof that it was an inhabitant of the Southern District of New York, would have been sustained and the cause dismissed, because under the statute, where jurisdiction is conferred solely by reason of the Federal question, it must be brought in the district of which the defendant is an inhabitant In the suit in question the plaintiffs not only resisted the removal of the cause by protesting in the State court (Petition, pp. 9 and 10), but they promptly entered their appearance in the Circuit Court solely for the purpose of presenting a motion to remand, following the form approved in the Wisner case, thus bringing the case fairly under the rule prescribed in the Wisner case (Petition, pp. 11 to 14).

IV.

The Texas & Pacific Railway Company is an inhabitant of the Southern District of New York, and not of the Northern District of Texas.

(1) In the case of Galveston, Harrisburg & San Antonio Railway Co. v. Gonzales, 151 U. S. 507, this court cited with approval certain cases wherein it was held that where a corporation is not located by the terms of its charter, its residence and location are to be regarded in the place where it keeps its principal office and does its corporate business, and sus-

tained a plea to the jurisdiction of the Circuit Court for the Western District of Texas interposed by the defendant, a Texas railway company, which alleged that its principal office was in the Eastern District, although it admitted operating a line of railway through the county where such suit was pending. The dissenting opinion in the Gonzales case uses this language, which clearly gives effect to the opinion of the court: "In "other words, the legal presumption that the members of a "corporation are citizens of that State under which the cor- "porate body is created, is, by the opinion of the court, re- "stricted so as to give that citizenship a legal residence con- "fined to the place where the corporate body has its principal "office." The word "inhabitant," as used in the judiciary act, is synonymous with the word "citizen" as used therein. Shaw v. Quincy Mining Company, 145 U. S. 144. In speaking of a Federal corporation it was said in Orange National Bank v. Craven, 7 Fed. 149: "Strictly, then, the plaintiff is a citizen "of the United States, but not of any State. Still the plaintiff, "though organized under the laws of the United States, is, "by such organization and law, located in the State of Massa- "chusetts, and by a parity of reason its stockholders may be "presumed to be citizens of said State, and the corporation is "entitled to sue as a citizen of Massachusetts." In the early cases before the Act of 1875, which for the first time invested the Circuit Courts of the United States, without reference to the citizenship of the party, with original jurisdiction of a suit arising under the constitution or laws of the United States, it was held that Federal corporations had a right to maintain suits in the Federal court as citizens of particular States. Bank v. Deveaux, 5 Cranch 66; same case Federal Cases No. 916. This court also intimated in Northern Pacific Railway Company v. Amato, 144 U. S. 465, and in U. P. Ry. Co. v. Harris, 158 U. S. 326, that Federal corporations were citizens of some particular State. The case of Wolf v. C. O. & G. Ry. Co., cited under the preceding proposition, also recognizes the same fact.

The act incorporating The Texas & Pacific Railway Company provides that the board of commissioners, to perfect the organization, should meet in the City of New York within ninety days after the passage of this act, and when so met, the company's books should be opened for the subscription of capital stock of the company. See Section 2, Incorporation Act, Volume 16, U. S. Stats. at Large, p. 573. The same section also provides that the annual meetings of stockholders shall take place as provided in said company's by-laws. It, therefore, appears that Congress in creating The Texas & Pacific Railway Company established its principal office, citizenship and inhabitancy in the City and State of New York, and gave it the right, by its by-laws, to remove such office, inhabitancy and citizenship. In the absence of some particular showing on the part of the company that it has removed these from the City and State of New York, it will be presumed that they have continued where originally established. Neither the plaintiffs' petition (Petition, p. 2) nor the petition to remove (Petition, p. 5) discloses the place of the principal office, citizenship or inhabitancy of this railway company. These constituted the record before the State court, and plaintiffs in paragraphs 1 and 3 of their objections to such removal (Petition, p. 9) brought to the court's attention the fact that such removal should not be consummated because plaintiffs did not have the right to bring this suit, especially against such railway company, in the Circuit Court of the United States for the Northern District of Texas. The State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made, which, on its face, shows that the petitioner has a right to the transfer. It was said in Insurance Company v. Peehner, 95 U. S. 185: "His petition for removal when filed becomes a part of the "record in the cause. It should state facts which, when taken "in connection with such as already appear, entitle him to "the transfer. If he fails in this, he has not, in law, shown

"to the court that it can not 'proceed further with the suit.' "Having once acquired jurisdiction, the court may proceed "until it has been judicially informed that its power over "the cause has been suspended." The suit must be one that may be removed, and the petition must show a right in the petitioners to demand the removal. Stone v. S. C., 117 U. S. 430. The State court, therefore, in the exercise of its power, examined this record, and read it in the light of the act of incorporation of The Texas & Pacific Railway Company, and was justified in the conclusion that this suit could not have been brought in the Circuit Court for the Northern District of Texas, because of the inhabitancy of The Texas & Pacific Railway Company in the Southern District of New York. In this connection it is also submitted that it is incumbent upon a defendant seeking to remove a cause on the grounds of a Federal question involved, to allege its inhabitancy or citizenship so that the State court may be fully advised of its right to demand a removal. In other words, it is submitted that it is the duty of the party seeking to remove to show to the State court that it should proceed no further in the cause, and every fact which is material to support its demands should appear from the record, either in the petition itself or in the application to remove.

(2) The undisputed testimony of L. S. Thorne, the first vice-president of the company, offered by petitioners upon the hearing of the motion to remand (Petition, pp. 22 to 29), discloses the fact that the stock books and stock subscription books are kept at a principal office in the City of New York (p. 25), and that the by-laws fix the place of holding the annual meetings of the stockholders in the City of New York (pp. 24 and 25). It is true that there is an operating office in the City of Dallas, in the Northern District of Texas (p. 23), and that the stockholders and directors after meeting in New York pursuant to the by-laws, meet in the City of Dallas and ratify and approve what they have previously done in New

York ,p. 26). The railway company contends that this fixes its citizenship and inhabitancy in the Northern District of Texas, as well as in the Southern District of New York. It has been judicially determined by this Supreme Court, but upon just what evidence the record does not disclose, that The Texas & Pacific Railway Company has its principal office and place of business in the City of New York. Texas & Pacific Ry. Co. v. Commission, 162 U. S. 197. Applying the rule governing citizenship of State corporations, which is that they are presumed to be citizens of the State in which they are incorporated, and of the district in which their principal office is located, the citizenship and inhabitancy of this railway company should be presumed to be where it keeps open its books for subscription to its capital stock and where its stockholders meet pursuant to the by-laws and transact their business. This court has, upon several occasions, been called upon to determine whether corporations of one State reincorporated in another were citizens of the latter State, and in the case of St. Louis & S. F. Ry. Co. v. James, 161 U. S. 562, it is said: "We are now asked to extend the doctrine of undisputed citi- "zenship so that if a corporation of one State, indisputably "taken, for the purpose of Federal jurisdiction, to be composed "of citizens of such State, is authorized by the law of another "State to do business therein, and to be endowed, for local "purposes, with all the powers and privileges of a domestic "corporation, such adopted corporation shall be deemed to be "composed of citizens of the second State, in such a sense "as to confer jurisdiction on the Federal courts at the suit "of a citizen of the State of its original creation. We are "unwilling to sanction such an extension of the doctrine which, "as heretofore established, went to the very verge of judicial "power." The authorities upon this class of cases are reviewed in the case of Patch v. Wabash Railway, 207 U. S. 277, and following the case of Memphis & C. R. Co. v. Alabama, 107 U. S. 581, it is there held that the maintenance of a

general office in a state of reincorporation, and a requirement that a majority of the directors should be residents of the latter State, makes it a citizen of that State. The general office referred to is undisputably an office of the character mentioned in the Memphis & C. Ry. Co. v. Alabama, which is one where are kept open books for subscription of stock to a certain amount and where elections are required to be held. The Dallas office of The Texas & Pacific Railway Company is simply an operating office, and while it may be a general office in this sense, it is disclosed by the record not to be an office where stock can be subscribed or where transfers of stock can be noted upon its books, or where in truth and in fact its annual meetings are held in accordance with its own by-laws.

V.

Inasmuch as the individual defendants are shown by the record to be inhabitants of the Eastern District of Texas, plaintiffs could not have sued them jointly with the railway company in the Northern District of Texas, and therefore they did not have the right to remove or to join in the petition to remove the cause to the Circuit Court for the Northern District of Texas.

The authorities cited under the third proposition of this brief are applicable to the proposition here asserted.

This court, in the case of Greeley v. Lowe, 155 U. S. 72, after reviewing the several changes in the jurisdictional acts, saids: "As no exception was made in the act to the cases pro-"vided for by Sections 740, 741 and 742, it is at least open "to some doubt as to whether suits will lie against non-"resident defendants under those sections." In the case cited jurisdiction was maintained because the suit was one to partition real estate, and fell within Section 8 of the Act of 1887-8. In view of the fact that the Act of 1887-8 makes no excep-

tions other than Section 8, to the general rule that suits must be brought in the district of which the defendant is an inhabitant, it is respectfully urged that Section 737, being the Act of February 28, 1839, should not be construed as permitting a suit to be brought against a joint defendant found within the district in which the suit is brought. The provision for suing a defendant in a district in wheh he might be found was omitted from the Act of 1887-8 and all laws and parts of laws in conflict therewith were repealed. This preserved to every defendant, except in suits mentioned in Section 8, the right to be sued only in the district of which he was an inhabitant. The Act of February 28, 1839, was intended to remove the difficulties in cases in which it was necessary to join several defendants, some of whom were, and others were not, inhabitants of the district in which the suit was brought. Prior to the passage of that act it was impossible to maintain a suit in the Federal court upon a joint cause of action, unless all defendants were inhabitants of, or could be found within the district where the suit was brought. If Section 737 was ever a jurisdictional act, it was certainly amended by the Act of 1887-8, in reference to maintaining a suit against a party not an inhabitant of the district. Section 740 should, therefore, be construed, where authorizing a suit against two or more defendants residing in different districts of the State to be brought in either district, to apply solely to that class of actions mentioned in Section 8 of the Act of 1887-8. This construction permits the Circuit Court in any State to render a proper judgment in any such suit against any inhabitant of such State when served with process. The same effect should be given to Section 10 of the Act of March 11, 1902, 32nd Statutes, page 68, authorizing process to be issued against defendants residing in different districts of Texas. Such a construction does not in any way modify the venue clause in the Act of Congress, but leaves the jurisdiction of the Circuit Court exactly as the Act of 1887-8 fixes it. A plaintiff, there-

fore, can not, under the last Act of Congress, require a defendant to answer in any suit in any district in which he is not an inhabitant, unless such suit is of the character mentioned in Section 8, and if such defendant not being an inhabitant of the district can not be sued in the Circuit Court of such district, then it follows under the Wisner case, that such defendant has not a right to remove such case to the Circuit Court. It is pleaded that the defendants, Slayter and Rasmussen, are each inhabitants of Harrison County, in the State of Texas (Petition, p. 2). There is no averment in the petition to remove that their inhabitancy is elsewhere (Petition, pp. 5 to 8). Harrison County is in the Eastern District of Texas. (Act March 11, 1902, Chap. 183, Sec. 1, 32 Stat. 64.)

VI

Although a suit against a Federal corporation is prima facie a suit arising under the constitution and laws of the United States, so as to confer jurisdiction thereof upon the Circuit Court, it may be shown by a proper pleading, challenging the jurisdiction, that such suit does not involve a substantial controversy of this character, and if such pleading is interposed, before jurisdiction is assented to by such proceedings as practically admit that the suit does involve a substantial controversy of this character, and it then appears that there is no such substantial controversy, the case should be dismissed for want of jurisdiction.

Chief Justice Marshall in the case of Osborn v. Bank, 9th Wheaton, 827, says: "It is said that a clear distinction exists "between the party and the cause; that the party may origi- "nate under a law with which the cause has no connection. "This distinction is not denied, and if the Act of Congress was "a simple act of incorporation and contained nothing more, "it might be entitled to great consideration. But the act does "not stop with incorporated the bank. It proceeds to bestow

"upon the being it has made all the faculties and capacity "which that being possesses. Every act of the bank grows "out of this law and is tested by it. To use the language of "the constitution, every act of the bank arises out of this law." The Pacific removal cases, U. P. Ry. Co. v. Meyers, 115 U. S. 1, were removed under the Act of 1875, upon a petition which in each case averred that the defendant corporation had a defense to such action arising under and by virtue of the law of the United States incorporating it. This allegation fairly placed in issue some, or all of the questions, which Chief Justice Marshall so fully developed in the Osborn case, and which were alluded to in the opinion in the Pacific removal cases. Consideration of the foregoing distinction which Chief Justice Marshall declared existed was thereby precluded. In the Osborn case it was said, that the charter of incorporation not only creates it, but gives it every faculty which it possesses, and it was therefore concluded that a being thus constituted could not have a case which did not arise literally, as well as substantially, under the laws of the United States. The several acts which constitute the charter of The Texas & Pacific Railway Company are not so broad in their character as the charter of the bank. This railway company has power to acquire rights, to transact business, to make contracts, to operate railroads and to employ men through whom it may commit acts of negligence which are not given and measured by its charter or the laws of the United States. The charter is an act of incorporation and the granting of a right to construct a line of railroad in certain territory. In the Pacific removal cases each of the defendants pleaded that they had a defense arising under their incorporation act, thus insisting that there was a substantial controversy involving the construction of the laws of the United States, the nature of which defense it was not necessary for the defendants to disclose and which was not, in fact, disclosed. There has been no case since the Pacific removal cases and since the Act of 1887-8

in which the question involved in those cases has been discussed by this court, except that of Texas & Pacific Railway Company v. Cody, 166 U. S. 606, in which the railway company expressed apprehension lest this court hold that jurisdiction was not maintainable within the rule laid down in Tennessee v. Union & P. Bank, 152 U. S. 454, and other cases, because plaintiff below did not allege that defendant was a Federal corporation, but rather the contrary. This was a case which was originally instituted in the State court and removed without objection to the Federal court, where there was no motion made to remand. The railway company, itself, raised for the first time the preliminary question of jurisdiction in the Supreme Court, and its brief filed in the case was in support of such jurisdiction. The defendant in error, Cody, who had secured judgment in the court below for $7,500.00, was interested in maintaining jurisdiction. While the opinion of the court probably would not have been otherwise had there been a party in interest presenting views in opposition to the jurisdiction, the opinion is, nevertheless, one which was rendered without the benefit of any brief or suggestions from any counsel in opposition to jurisdiction. Moreover, this court took the pains to say that there was no controversy over the fact that the defendant corporation owed its existence to acts of Congress, and was entitled to remove the case as one arising under the laws of the United States in accordance with dicisions of this court in the Pacific removal cases. It is, therefore, submitted that this case ought not to be authority for any further proposition than that which the court was called upon to decide, viz: that mentioning the name of the defendant, The Texas & Pacific Railway Company, was sufficient to describe it as a Federal corporation and therefore make it appear by the plaintiff's petition that the case arose under the constitution and laws of the United States. The decision in the Pacific removal cases was rendered before this court decided the case of Western Union Telegraph Company

v. Ann Arbor Railroad Company, 178 U. S. 239, and the cases cited therein, in which it was held that before jurisdiction could be maintained it must appear on the record by a statement in legal and logical form such as it required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the constitution or some law or treaty of the United States. In the case cited it was said that it view of the settled construction of a Federal statute, this court could not permit a contention adverse to such construction to be recognized as a basis of jurisdiction. See also the case of St. J. & G. I. Ry. Co. v. Steele, 167 U. S. 659. Chief Justice Marshall in the Osborn case said: "The right to sue, "if decided once, is decided forever; but the power of Con- "gress was exercised antecedently to the first decision on that "right ,and if it was constitutional then, it can not cease "to be so because the particular question is decided. It may "be revived at the will of the party, and most probably would "be renewed were the tribunal changed; but the question re- "specting the right to make a particular contract, or acquire "a particular property, or to sue on account of a particular in- "jury, belongs to every particular case and may be renewed "in every case. The question forms an original ingredient in "every cause." It is submitted that the later decisions of this court following the rule laid down in the case of Western Union Telegraph Company v. Ann Arbor R. Co., id., have superseded or modified these principles declared in the Osborn case. It is settled beyond any room for discussion, that The Texas & Pacific Railway Company may be sued alone or jointly with another for a tort committed in the operation of its road. It is likewise settled that in such a case it has absolutely no defense under the constitution and laws of the United States, but that these cases are adjudicated upon general principles of law, as was the Gableman case. To defend this case upon the ground that there can be no recovery by

reason of a certain construction of the charter of this railway company, would be to present to the court a frivolous question. Cases of this character against The Texas & Pacific Railway Company involve no substantial controversy under the laws of the United States, and if its charter ever did call for a construction pertaining to these cases it has, by implication, been long construed so as to fix liability upon it when such liability arose by the general principles of law outside of its charter. Assume that a case were instituted against The Texas & Pacific aRilway Company in the Federal court, and that it should interpose a plea to the jurisdiction, alleging that its liability to be sued had long been settled by the courts of the United States, and that if any liability arose against it, it arose by reason of the application of general principles of law to the facts stated in the plaintiff's petition, and that it desired to interpose no defense arising under the constitution and laws of the United States, and that the construction thereof was not called in question, should not such a plea be sustained? If not, the rule thus applied would be entirely different from that applied in the line of cases which hold that there must be a controversy involving the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, or else the suit is not one arising under such constitution and laws. If such a plea should be sustained, a motion to remand, which is but a plea to the jurisdiction, should likewise be sustained, provided it appears from the record that there is no such substantial controversy, involving the effect or construction of such constitution or laws. It does not appear upon the face of plaintiffs' petition that any right is claimed against the defendant company by reason of its Federal character, except

the right to sue it, or that the defendant has any defense or can have any defense arising under the constitution or laws of the United States. Cases removed under the present Act are not like the Pacific removal cases under the law of 1875, when the defendant was entitled to aver that it had a defense arising under such laws, and when such averment entitled the case to be removed. It may be said that this court, by its repeated recognition of its own jurisdiction, and of the jurisdiction of Circuit Courts in suits against Federal corporations ,and by the language used in the case of Swafford v. Templeton, 185 U. S. 494, has too firmly establish the principle that these are controversies arising under the constitution and laws of the United States, to permit any pleading, and particularly a demurrer, to the jurisdiction to be successfully interposed, especially in the face of the fact that this court has often, of its own motion, dismissed causes for want of jurisdiction appearing upon the face of the record, and that its failure to so act in like cases against Federal corporations has established a precedent that a demurrer of this character is not good. It is, however, respectfully submitted that the class of cases which it has dismissed under this rule have been those where jurisdiction was conferred solely by reason of diverse citizenship, and where such diverse citizenship did not appear upon the face of the record. There may be cases which this court has of its own motion dismissed for want of jurisdiction, upon the ground that no Federal question arose, but generally jurisdictional questions in this class of cases have always reached this court after a demurrer or plea has been interposed in the Circuit Court, or where there was no Federal question, or where it was anticipated as a defense. It is submitted that the slightest

reference to the laws of the United States, and the assertion of a claim or right thereunder, is sufficient to confer jurisdiction upon the Circuit Court, unless the adverse party brings to the court's attention the fact that no substantial Federal controversy exists. In other words, where there is a Federal question presented by the plaintiff's petition, the defendant has his option to first call the court's attention to the character of the Federal question at issue by a proper plea or demurrer to the jurisdiction, or to waive this right, and have the question considered solely in determining the merits of the controversy. The Circuit Courts themselves have jurisdiction if the record discloses that the constitution or laws of the United States may be called in question. It is for the party attacking the jurisdiction to show at the very outset that they are not substantially called in question, and this may be done by either demurrer or plea. If not so shown at the outset, this privilege is waived, and jurisdiction has properly attached and remains in the Circuit Court and all appellate courts, the jurisdictions of which is dependent upon the existence of a Federal question. In the case at bar, the plaintiffs protested in the State court that there was no jurisdiction in the Federal court, and in their motion to remand they again challenged the jurisdiction of the court. These should be regarded in the nature of demurrers to the jurisdiction, and lead to an examination of the petition to see if there is any controversy which calls in question the effect or construction of the constitution or laws of the United States.

It is, therefore, respectfully submitted that the State court was justified in retaining jurisdiction of the original action in question: that its jurisdiction ought not to be interfered

with by the Circuit Court for the Northern District of Texas, but that, on the contrary, the Circuit Court for the Northern District of Texas should have remanded the cause to the State court, and not restrained its prosecution therein. A writ of mandamus is, therefore, asked that this jurisdiction of which the State court has, in effect, been wrongfully deprived, and which is being wrongfully asserted by the Circuit Court for the Northern District of Texas, may be taken from the latter and reinvested in the State court.

Respectfully submitted,

CARDEN, STARLING & CARDEN,

Attorneys for Petitioners.



Attorney and of Counsel for Petitioners.

FILED.
JAN 11 1909
JAMES H. McKENNE
CL

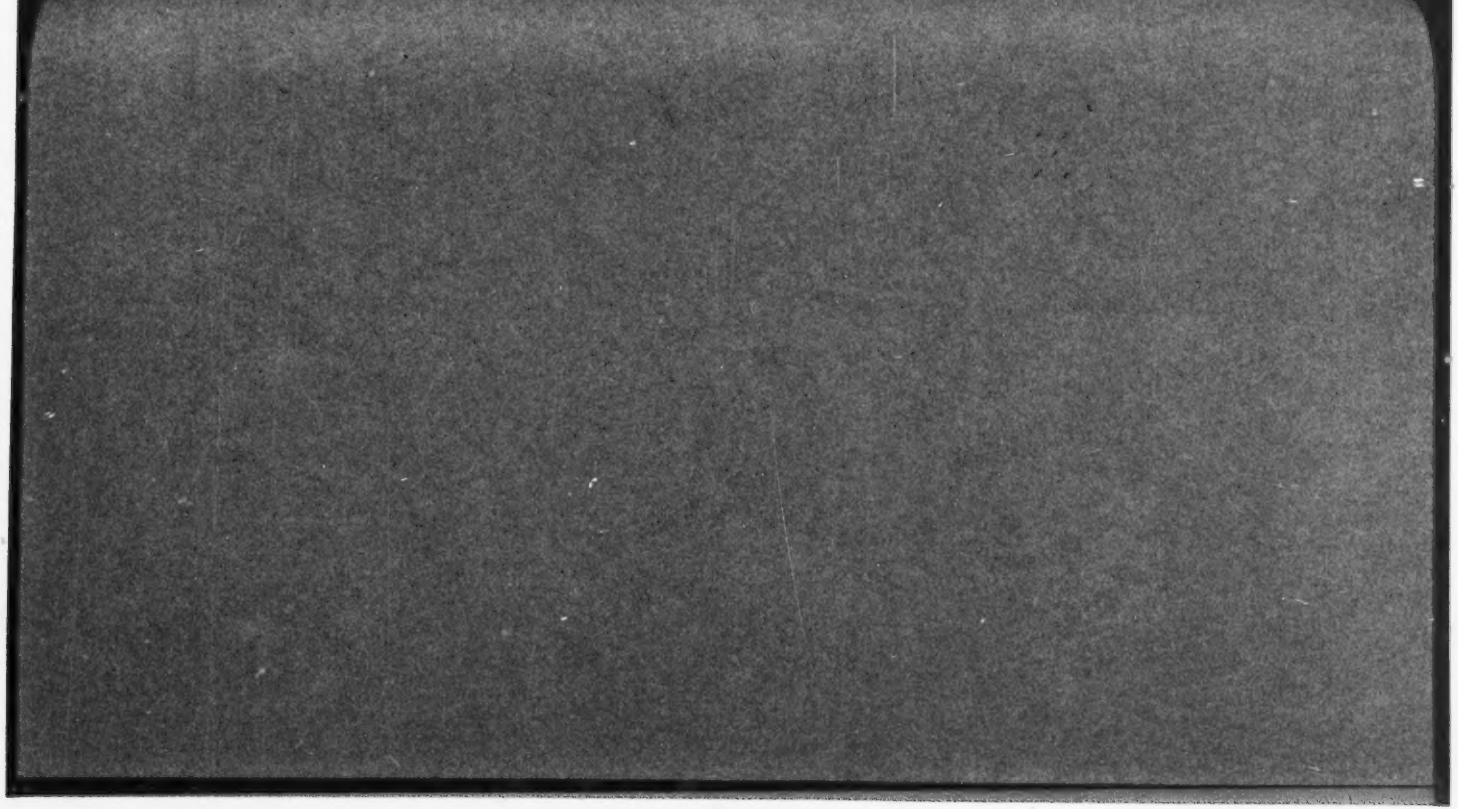
Supreme Court of the United States

OCTOBER TERM, 1908
10 ORIGINAL

IN THE MATTER
of

THE APPLICATION OF MARY DUNN, IN HER OWN BEHALF, AND AS NEXT FRIEND OF WALTER DUNN, GEORGE DUNN, JAMES DUNN, AND ANCEL DUNN, MINORS, AND AMANDA DUNN, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE EDWARD R. MEEK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

TRANSCRIPT OF THE RECORD IN CASE No. 2493, LAW, MARY DUNN ET AL. Vs. THE TEXAS & PACIFIC RY. CO. ET AL., AND No. 2511, IN EQUITY, THE TEXAS & PACIFIC RY. CO. ET AL. Vs. MRS. MARY DUNN ET AL., FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.



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MRS. MARY DUNN ET AL.
vs.
THE T. & P. RY. CO. ET AL.

CASE NO. 2493.
LAW.

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Filed January 13, 1908.

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PLAINTIFF'S ORIGINAL PETITION.
Filed August 1, 1907.

THE STATE OF TEXAS } In the District Court for the Four-
County of Dallas. } teenth Judicial District of Texas,
Dallas County.

TO SAID HONORABLE COURT:

Mrs. Mary Dunn, suing for herself and as next friend and natural guardian of Walter Dunn, George Dunn, James Dunn, and Ancel Dunn and Amanda Dunn, hereinafter styled plaintiffs, complaining of the Texas & Pacific Railway Company, and C. E. Slayter and Carl Rasmusson, hereinafter styled defendants, respectfully represent: That plaintiffs reside in Dallas County, Texas, of which County and State they are each and all citizens, inhabitants and residents, and that the defendant, Texas & Pacific Railway Company, is a corporation duly incorporated, with an office and local agent in said Dallas County, Texas; that the defendant, C. W. Slayter, is a resident, a citizen and an inhabitant of Harrison County, in the State of Texas, of which State he is a citizen; that the defendant, Carl Rasmusson, is a resident, a citizen and an inhabitant of Harrison County, in the State of Texas, of which State he is a citizen; that each of said defendants, Slayter and Rasmusson, are to be found in Dallas County, Texas; that plaintiff, Mrs. Mary Dunn, was the wife of J. J. Dunn, up to the time of his death, which occurred as hereinafter alleged, and that plaintiff, Walter Dunn, is a minor child

eight years of age, the son of said J. J. Dunn by a former marriage, his mother being dead, and that the said Walter Dunn has no legal guardian; that the plaintiff, George Dunn, is about five years of age, James Dunn about four years of age, and Ancel Dunn about nineteen month of age, are the minor children of said Mary Dunn and J. J. Dunn. That Amanda Dunn is a feme sole, residing in Dallas County, Texas, and is the mother of J. J. Dunn, deceased; that she did not receive and would not have received any pecuniary aid from said J. J. Dunn, and is joined herein only for the purpose of having her rights adjudicated

Plaintiffs allege that heretofore, to-wit, on July 15, 1906, and long prior thereto and ever since said date the defendant, Texas & Pacific Railway Company, was a common carrier of freight and passengers for hire, and owned, controlled and operated a line of railway, a part of which is situated in the City of Dallas, in Dallas County, Texas; that on July 15, 1907, the said J. J. Dunn, husband of Mrs. Mary Dunn and father of the aforesaid minor children, was killed directly and proximately as is more fully hereinafter alleged through the negligence of the defendants, and thereby plaintiffs have been damaged in the sum of Eighty-five Thousand Dollars.

2.

Plaintiffs allege that the railroad tracks of defendant railway company in the City of Dallas, Texas, intersect and cross Race Street and College Avenue; that on July 15th, at a point between said streets the said defendant railway company maintained a main track and other collateral side tracks; that up and down and between said tracks and by the side of same, and especially between the rails of its main line tracks, and by the side of same, and north and south of same, for many years there were paths used by the public and by pedestrians

in passing to and fro, and that said points and places were public places, and the public generally had for a long time been using said tracks and pathways for such purposes within the knowledge of each of the defendants, and the agents and servants of the defendant railway company, and was permitted by the defendant railway company, without protest or objection of any kind, to use the same, and the defendant railway company acquiesced in the use of same by the public and impliedly and expressly agreed to such use by the public in general, and the said J. J. Dunn had thereby acquired a license and legal right to use said pathways and said track and tracks in walking on same and in the manner same was being used by him at the time he was struck by one of the trains of defendant railway company operated by the other defendants as hereinafter alleged; that the lines of said track at said point are in what is known as Pacific Avenue in the City of Dallas, Texas, which said avenue at the point where said J. J. Dunn was struck, is a public street and highway; that said pathway, public way and street and highway, and the passage way over the same, were for many years prior to said date and ever since said date used continuously, constantly and daily by the public and by large throngs of people, all of which was known to each of the defendants.

Plaintiffs allege that on July 15, 1907, there was in full force and effect a statute of the State of Texas, Sayles' Texas Civil Statutes, Vol. 2, Art. 4507, and it among other things required defendant to place on its locomotive engines and each of them a bell of at least thirty pounds weight, and a steam whistle, requiring that the whistle shall be blown and the bell rung at a distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall cross such public road or street or shall have stopped, and any engineer having charge of said engine and neglecting to comply with such provisions

shall be fined in any sum not less than $5.00 nor more than $100.00 for such neglect, and the corporation operating such railway shall be liable for all damages which shall be sustained by any person by reason of such neglect.

Plaintiffs allege that on July 15, 1907, both a long time prior thereto and ever since said date, there were in full force and effect in the City of Dallas, Texas, the following ordinances, viz:

"Criminal Ordinances of the City of Dallas, Texas.

TITLE XVI.

Regulations Concerning Railroads and Depots.

Chapter 1.

Rate of Speed.

Art. 423. That it shall not be lawful to conduct, run or cause to be run, within the limits of this city, any railway engine or car at a speed greater than seven miles an hour.

Ringing Bell Required.

Art. 424. That it shall not be lawful to conduct, run or cause to be run any railway engine or locomotive, within the limits of this city, without ringing a bell attached thereto, before starting and all the time said engine or locomotive may be in motion.

Penalty.

Art. 427. Any person who shall violate or fail to comply with the provisions of the four foregoing articles shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than three nor more than one hundred dollars."

Plaintiffs say that on July 15, 1907, while walking along said paths, passage ways, highway and track of said defendant railway company and within the corporate limits of the City

of Dallas, Texas, the said J. J. Dunn was, by the negligence as hereinafter set forth, of the defendant, Texas & Pacific Railway Company, and of its agents and servants, the defendants, C. W. Slayter and Carl Rasmusson, who were in charge respectively as engineer and fireman of one of defendant railway company's engines, drawing one of its trains, struck, run into, run against and run over by said engine and train, and instantly killed thereby; that at the time and place when and where the said J. J. Dunn was killed, the defendants, C. W. Slayter and Carl Rasmusson, were, and for a long time theretofore had been servants of the defendant railway company in charge and control of said train, and then and there and for a long time theretofore had continuously been respectively engineer and fireman of said train and said engine drawing said train, and said negligence of said defendant railway company was done by and through its said servants and other of its servants then and there in its employment and said negligence was the joint negligence of all of the defendants.

Plaintiffs allege that on said July 15, 1907, the said J. J. Dunn was walking along at said place in the City of Dallas, and that while in the exercise of ordinary care for his own safety and being at a place where he had a legal right to be in said city, the defendant negligently ran and moved one of its trains over, into and against the said J. J. Dunn, whereby he was injured, and that said injuries proximately caused his death almost immediately thereafter.

Plaintiffs allege that at the time of the death of the said J. J. Dunn, he was in the employ of the Texas Grain & Milling Company, and that he resided at No. 142 South Hill Avenue, in the City of Dallas, Texas, and that at such time he was on his way from his home to his place of employment, and that he was traveling the most direct route between said points, and in fact the only route that was available to him.

Plaintiffs allege that the defendants were guilty of negligence in permitting and causing said engine and train to run into, against and over said J. J. Dunn and injuring him so that he was instantly killed.

Plaintiffs allege that defendants were negligent in that it was usual and customary for the said train and other west bound trains to use the north main track, but that upon this occasion they used the south main track without giving any warning by blowing of whistle or ringing of bell or making other loud noise that they were on such track.

Plaintiffs allege that the defendants were guilty of negligence in violating the said city ordinances of the City of Dallas as they are herein set out in that they conducted, ran and caused to be run in the said City of Dallas, Texas, and at said time and place, its said train at the speed greater than seven miles an hour and at the high and unlawful and dangerous rate of speed of, to-wit, twenty-five miles an hour; and were guilty of negligence in that defendants conducted, ran and caused to be run, its said train at said time and place without ringing any bell, if any on its said engine and attached thereto, before starting and all the time said engine was in motion; and were guilty of negligence in that they violated the requirements of Article 4507, Sayles' Texas Civil Statutes, as set out above, in that it did not blow the whistle, if any, and did not ring the bell, if any, on said engine, at a distance of at least eighty rods from the place where said defendant's railroad track crossed said College Avenue and Race Street, and the intervening streets of Crutcher and Simpson, and Elm Street, which intersects said line of railway just east of Race Street, nor did they blow the whistle, if any, nor did they ring said bell, if any, at all on said occasion, and were guilty of negligence in that they failed to exercise ordinary care to lookout or keep a lookout for said J. J. Dunn, and failed to exercise ordinary care to avoid and keep from injuring him;

and were guilty of negligence in that they ran and moved the said train at the high and unlawful rate of speed and thereby failed to keep the said train under their control at a time and place when they should have anticipated and expected and did anticipate and expect the presence of the said J. J. Dunn and others, for said place was being constantly, continuously and daily used by great throngs of people, and so known to the defendants, and the said defendants were guilty of negligence in that they failed to give the said J. J. Dunn any warning or notice of the approach of said train and failed to exercise ordinary care so to do; and were guilty of negligence in that the said J. J. Dunn was unawares of the approach of said train and had no notice or warning of the same, and the defendants each and all knew that he was unaware of the approach of said train and had no notice or warning of the same; and said defendants were guilty of negligence in that they failed to move said train at a slow and careful rate of speed so that when they discovered, or by the exercise of ordinary care ought to have discovered the said J. J. Dunn at said place, they could have stopped said train and could have warned said J. J. Dunn of the approach of said train and thereby have avoided the injuries which resulted in his death; and the said defendants were guilty of negligence in that at said time and place the said J. J. Dunn occupied a position of imminent peril which was discovered by said defendants, and after such discovery the defendants could have reduced the speed of said train and could have stopped the same and could have avoided the injuries which resulted in the death of said J. J. Dunn, yet they failed so to do, but negligently caused and allowed said train to run over and into and collide with the said J. J. Dunn and kill him as aforesaid, and that each and all of the said acts of negligence of said defendants proximately caused the injuries which produced his said death and proximately caused his said death.

Plaintiffs allege that at the time of the death of the said J. J. Dunn, he was 38 years of age, and had a life expectancy and a reasonable expectation of living for a period of thirty years longer if he had not been killed as aforesaid; and that the said J. J. Dunn at and prior to the time of his said death, was in strong, robust and healthy condition and was earning and capable of earning the sum of Fifty ($50.00) Dollars per month, which amount he contributed exclusively to the support and maintenance of himself, and of Mrs. Mary Dunn, Walter Dunn, George Dunn, James Dunn and Aneel Dunn, and would have continued permanently to have contributed his said earnings to their support and maintenance, increasing same from time to time during the balance of his natural life, had he not been killed as the direct and proximate result of the negligence of the defendant as aforesaid; that he had a reasonable expectancy of an early increase in salary; that he was a kind and affectionate husband and father; that he worked regularly, continuously and industriously and that the remainder of his time he generally spent with his said wife, Mrs. Mary Dunn, in the care of and attention to their home and to the proper rearing of their said minor children; that he lived a moral and exemplary life and would have used his best efforts to permanently have reared his said minor children in those moral and Christian virtues which were and are so necessary to their welfare; that his services to his said wife and children and the benefit of the moral and mental training to be derived by them from the said J. J. Dunn outside of the pecuniary value they would have derived from him was invaluable; that he was economical, industrious, sober and intelligent, and that he did apply and would have continued permanently to apply said traits of character toward the advancement of his said wife and children.

Plaintiffs allege that on account of the death of the said J. J. Dunn, the said Mary Dunn has been damaged directly

and proximately through the aforesaid negligence of the defendants in the sum of Twenty-five Thousand ($25,000.00) Dollars, and the said Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, have each been damaged in the sum of Fifteen Thousand ($15,000.00) Dollars.

Wherefore plaintiffs pray that the defendants each be cited according to law to answer herein, that upon final hearing hereof the plaintiff, Mrs. Mary Dunn, have judgment against the defendants in the sum of Twenty-five Thousand ($25,000.00) Dollars, and that each of said plaintiffs, Walter Dunn, George Dunn, James Dunn and Ancel Dunn have judgment against said defendants in the sum of Fifteen Thousand ($15,000.00) Dollars, and for all costs of suit and for such other and further relief both general and special, legal and equitable, as to this Honorable Court may seem just and right.

CARDEN, STARLING & CARDEN,
Attorneys for Plaintiffs.

Filed August 1, 1907.

H. H. WILLIAMS, Clerk District Court.
By S. T. Jackson, Deputy.

TRANSFER OF ONE-HALF INTEREST OF CLAIM.

Filed August 1, 1907.

Mrs. Mary Dunn, et al., vs. Texas & Pacific Ry. Co. } No. 3030. In the Fourteenth Judicial District Court of Texas, Dallas County.

KNOW ALL MEN BY THESE PRESENTS:

That I, Mrs. Mary Dunn, acting for myself and on behalf of my minor children, Walter Dunn, George Dunn, James Dunn,

and Ancel Dunn, for and in consideration of professional services rendered and to be rendered by Carden, Starling & Carden, a firm of lawyers, have this day assigned, sold, set over, transferred and delivered, and by these presents do assign, sell, set over and deliver, unto the said Carden, Starling & Carden, a one-half interest in and to all claims and causes of action, which I or either of us may have or be entitled to have against the Texas & Pacific Railway Company, on account of the death of J. J. Dunn, my husband and father of said minor children, his said death having occurred by reason of being struck by a train on the track of said Texas & Pacific Railway Company, in Dallas, Texas, about July 15, 1907.

MARY DUNN,

For Myself and as Next Friend of Walter Dunn, George Dunn, James Dunn and Ancel Dunn.

State of Texas,
County of Dallas.

Before me, A. A. Cocke, a notary public in and for Dallas County, Texas, on this day personally appeared Mrs. Mary Dunn, a feme sole, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office on this, the 25th day of July, A. D. 1907.

A. A. COCKE,

Notary Public in and for Dallas County, Texas.

Filed August 1, 1907.

H. H. WILLIAMS, Clerk District Court.
By S. T. Jackson, Deputy.

CITATION.

Issued August 2, 1907.

THE STATE OF TEXAS.

To the Sheriff or any Constable of Dallas County—Greeting:

You are hereby commanded to summon: Texas & Pacific Railway Company (a corporation), with an office and local agent in the County of Dallas, and State of Texas, and C. W. Slayter and Carl Rasmusson, each of whom are residents of the County of Harrison, State of Texas, but who can now be found in Dallas County, Texas, to appear before the District Court of the Fourteenth Judicial District of Texas, at the next regular term thereof, to be held in the Court House in the City of Dallas, on the second Monday in September, 1907, then and there to answer to the petition of Mrs. Mary Dunn, suing for herself, and as next friend and natural guardian of Walter Dunn, George Dunn, James Dunn and Ancel Dunn, filed in said Court on the 1st day of August, 1907, against the said Texas & Pacific Railway Company (a corporation), C. E. Slayter and Carl Rasmusson, for suit, said suit being numbered 3030, the nature of which demand is as follows, to-wit: Suit for damages: Plaintiffs allege that the defendant herein is now and was at the time of the accident herein complained of, maintaining and operating a line of railway through Dallas County, and the City of Dallas; that Mrs. Mary Dunn was the wife of J. J. Dunn up to the time of his death, and the other defendants were minor children of J. J. Dunn. That on the 15th day of July, 1907, J. J. Dunn while walking along Pacific Avenue at the intersection of Race Street in Dallas, Texas, and while exercising ordinary care for his own safety, was run over by one of the trains of defendant railway company, and killed. That at the time of said accident, C. W. Slayter and Carl Rasmusson were respectively engineer and fireman in charge of

said train. Plaintiffs allege that through the negligence of said defendants in failing to give warning of their approach and in running at an unlawful rate of speed, they were in violation of the laws of the State of Texas, and the city ordinances, and through such negligence brought about the death of the said J. J. Dunn; whereby the said Mary Dunn has been damaged in the sum of $25,000.00, and each of the above mentioned minors in the sum of $15,000.00 each. Plaintiffs pray that defendants be cited to appear and answer this petition, and that on hearing they have judgment for the amount of damages as indicated, for costs of suit, and for such further relief, general and special, legal and equitable, to which they may be entitled.

And you will deliver to the said Texas & Pacific Railway Company (a corporation), through its local agent, and to C. W. Slayter and Carl Rasmusson, and each of them, a true copy of this citation.

Herein fail not, but have you then and there this writ showing how you have executed the same.

Witness: H. H. WILLIAMS, Clerk of the District Court of Dallas County.

Given under my hand and seal of office, at Dallas, this 2nd day of August, 1907. H. H. WILLIAMS,

Clerk District Court, Dallas County.

By S. M. Speake, Deputy.

SHERIFF'S RETURN.

Came to hand on the 2nd day of August, 1907, at 10 o'clock a. m., and executed the 5th day of August, 1907, at 10:50 o'clock a. m., by delivering to J. W. Ayers, freight agent at Dallas, Texas, of the Texas & Pacific Railway Company, and afterwards on August 6, 1907, further executed by delivering

to C. W. Slayter and Carl Rasmusson, the within named defendants, in each person, a true copy of this writ.

A. L. LEDBETTER,
Sheriff Dallas County, Texas.

By W. H. Coats, Deputy.

Fees.

Serving Three Copies	$2.25
Mileage	.30
Total	$2.55

Issued this 2nd day of August, 1907.

H. H. WILLIAMS, Clerk.

By S. M. Speake, Deputy.

ORIGINAL ANSWER OF DEFENDANT, T. & P. RY. CO.

Filed September 9, 1907.

Mrs. Mary Dunn, et al.,
No. 3030. vs.
The Texas & Pacific Ry. Co., et al.

In the Fourteenth District Court, Dallas County, Texas.

Now comes defendant, The Texas & Pacific Railway Company, by its attorneys, and without waiving in any respect its petition and bond filed herein and presented to the Court for removal of this cause to the Circuit Court of the United States for the Northern District of Texas, at Dallas, but expressly relying and insisting upon same and protesting that this Court is without jurisdiction over this defendant, and that the said Circuit Court of the United States for the Northern District of Texas has complete and exclusive jurisdiction by reason of the petition and bond filed by this defendant and presented

to the Court herein, yet nevertheless in case this Court shall require defendant to answer, and saving to itself any and all rights and that it has by virtue of said petition and bond for removal, and answering subject to same, it says:

(1) It excepts to the plaintiffs' petition and says that the same is insufficient in law and presents no cause of action against it, and of this it prays the judgment of the Court.

(2) It denies all and singular the allegations in the plaintiffs' petition contained and demanding strict proof of same, puts itself upon the country.

Wherefore, it prays that it may go hence without day and recover of the plaintiff all of its costs in this behalf incurred and for such other and further relief as to the Court it may appear entitled. FLIPPEN & McCORMICK,

Attorneys for Defendant, The T. & P. Ry. Co.

Filed September 9, 1907.

H. H. WILLIAMS, Clerk District Court.
By R. L. Petty, Deputy.

ORIGINAL ANSWER OF C. W. SLAYTER AND CARL RASMUSSON.

Filed September 9, 1907.

Mrs. Mary Dunn, et al.,
No. 3030. vs.
The Texas & Pacific Ry. Co., et al.

In the Fourteenth District Court, Dallas County, Texas.

Now comes C. W. Slayter and Carl Rasmusson, defendants in the above styled and numbered cause, by their attorneys, and having heretofore joined with their co-defendant, The Texas & Pacific Railway Company, in a petition and bond for removal of this cause to the Circuit Court of the United States

for the Northern District of Texas, at Dallas, they in no manner waive their desire or right for removal of this cause to such Circuit Court and answer herein only subject to said petition and bond for removal, and reserving all their said rights thereunder and only in the event that they are required to answer by the rule of this Court, they say:

(1) They except to the plaintiffs' petition and say that the same is insufficient in law and presents no cause of action against them, and of this they pray the judgment of the Court.

(2) They deny all and singular the allegations in the plaintiffs' petition contained and demanding strict proof of same, put themselves upon the country.

Wherefore, they pray that they may go hence without day and recover of the plaintiffs all of their costs in this behalf incurred and for such other and further relief as to the Court they may appear entitled.

FLIPPEN & McCORMICK,
Attorneys for Defendants, C. W. Slayter and
Carl Rasmusson.

Filed September 9, 1907.
H. H. WILLIAMS, Clerk District Court.
By R. L. Petty, Deputy.

BOND FOR REMOVAL.

Filed September 9, 1907.

Mrs. Mary Dunn, et al.,
No. 3030. vs.
The Texas & Pacific Ry. Co., et al.

In the District Court of Dallas County, Texas, Fourteenth Judicial District.

KNOW ALL MEN BY THESE PRESENTS:

That the Texas & Pacific Railway Company C. W. Slayter and Carl Rasmusson, as principals, and Edw. O. Tenison and Fred Harris, as sureties, are held and firmly bound unto Mrs. Mary Dunn for herself and as next friend and natural guardian of Walter Dunn, George Dunn, James Dunn and Ancel Dunn, and unto the said Walter Dunn, George Dunn, James Dunn and Ancel Dunn and unto Amanda Dunn in the penal sum of Five Hundred Dollars, for the payment whereof, well and truly to be made, unto the said Mrs. Mary Dunn for herself and as such guardian and unto the said Walter Dunn, George Dunn, James Dunn and Ancel Dunn and unto Amanda Dunn, their heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions that:

Whereas, the said The Texas & Pacific Railway Company has filed its petition in the Fourteenth District Court of Dallas County, for the removal of a certain cause therein pending, wherein Mrs. Mary Dunn et al. are plaintiffs, and the Texas & Pacific Railway Company et al. are defendants, said cause being numbered upon the docket of said court as No. 3030, to the Circuit Court of the United States for the Nothern District of Texas.

Now, therefore, if the said The Texas & Pacific Railway Company and said C. W. Slayter and Carl Rasmusson shall enter in said Circuit Court of the United States for the Northern District of Texas a copy of the record in said suit on the first

day of the next session thereof, and shall pay all costs which may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise, of full force and effect.

Witness our hands and seal this 5th day of September, 1907.

THE TEXAS & PACIFIC RAILWAY CO.
By Flippen & McCormick, Its Attorneys.
C. W. SLAYTER.
By Flippen & McCormick, His Attorneys.
CARL RASMUSSON.
By Flippen & McCormick, His Attorneys.
EDW. O. TENISON.
FRED HARRIS.

Filed this 9th day of September, A. D. 1907.

H. H. WILLIAMS, Clerk District Court, Dallas County, Texas.
By H. L. Petty, Deputy.

PETITION FOR REMOVAL.

Filed September 9, 1907.

Mrs. Mary Dunn, et al., vs. The Texas & Pacific Ry. Co., et al. No. 3030. | In the District Court of the Fourteenth Judicial District of Dallas County, Texas.

Petition for Removal.

The petition of the Texas & Pacific Railway Company, in which it is joined by defendants, C. W. Slayter and Carl Rasmusson, respectfully shows to the Court:

First—That The Texas & Pacific Railway Company was and is a corporation, duly organized and existing under and

by virtue of the laws of the United States, to-wit, "An Act to incorporate The Texas & Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas & Pacific Railway Company."

Second—That the above entitled action was commenced in the above named Court on the 1st day of August, 1907, and citation issuing therein was served upon defendant, The Texas & Pacific Railway Company, on the 5th day of August, 1907, and on the other defendants on the 6th day of August, 1907, which citation is returnable on the second Monday in September, 1907, it being the 9th day of September, and defendants are not, and will not be, required, by the laws of the State of Texas, or the rule of this Court, to answer or plead to the petition of the plaintiff before the 10th day of September, 1907.

Third—That the matter in dispute in this case exceeds, exclusive of the interest and cost, the sum of Two Thousand Dollars, and this suit arises under the laws of the United States, as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, Mrs. Mary Dunn, for herself and as next friend for her children, Walter, George, James and Ancel Dunn, to recover of defendants damages for the death of J. J. Dunn on account of being struck and killed by a Texas & Pacific engine, operated by C. W. Slayter as engineer and Carl Rasmusson as fireman, on the 15th day of July, 1907, at or near the intersection of Pacific Avenue and Race Street, in the City of Dallas, Texas. Amanda Dunn, mother of J. J. Dunn, is joined by plaintiff merely to have her rights adjudicated, it being alleged that she received nothing from deceased in the way of support or pecuniary aid. The amount of damage claimed is Eighty-five Thousand Dollars

($85,000.00). It is alleged that defendants are guilty of negligence in exceeding the speed limit allowed by the city ordinance and in failing to sound signals as required by law and in failing to stop the train after the danger of the said J. J. Dunn was discovered as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action. That this suit against defendant, The Texas & Pacific Railway Company, is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of the said defendant, and under which it was incorporated, that is to say, the Act of Congress of the United States, approved March 3, 1871, entitled "An Act to incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth—That the above entitled action is a civil suit arising under the laws of the United States, of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by Act of Congress approved March 3, 1887, to-wit: An Act entitled "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes,' and the Act of Congress approved August 13, 1888, entitled 'An Act to correct the enrollment of an Act approved March 3, 1887, entitled "An Act to amend Sections 1, 2, 3 and 10, of an Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes," ' approved March 3, 1875."

Fifth—Your petitioners further represent that defendants, C. W. Slayter and Carl Rasmusson, the enginer and fireman

respectively of the train alleged to have caused the death of J. J. Dunn, were, and are, men of very moderate estate and are unable to respond in damages and in the operation of said train simply acted under orders from their superior, The Texas & Pacific Railway Company, and said company, and it alone, is solely responsible and accountable for any and all damages that may have resulted to the plaintiff, if anyone is liable at all, and said defendants, C. W. Slayter and Carl Rasmusson, are not and were not guilty of any of the wrongs and acts of negligence set up and complained of in the plaintiffs' petition against them, and each and all of said allegations are falsely and fraudulenlty made for the purpose of avoiding the removal of this case and defrauding the Circuit Court of the United States of its right for jurisdiction herein under this application and accompanying bond.

Your petitioners herewith present and file a good and sufficient bond, conditioned that they will enter and file in the Circuit Court of the United States for the Northern District of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was orginally required therein. Your petitioners, therefore, pray the said Court to accept said petition and bond, and to remove this cause to the Circuit Court of the United States for the Northern District of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY CO.
C. W. SLAYTER.
CARL RASMUSSON.
By Flippen & McCormick, Attorneys.

The State of Texas,
County of Dallas.

E. W. Tower, being duly sworn, says that he is the agent of The Texas & Pacific Railway Company, being the assistant auditor of said company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

E. W. TOWER.

Sworn to and subscribed before me this, the 6th day of September, A. D. 1907. FREEMAN HALL,
Notary Public, Dallas County, Texas.

Filed September 9, 1907.
H. H. WILLIAMS, Clerk District Court.
By R. L. Petty, Deputy.

OBJECTIONS TO REMOVAL TO CIRCUIT COURT OF THE UNITED STATES.

Filed September 12, 1907.

Mrs. Mary Dunn, et al.,
No. 3030. vs.
The Texas & Pacific Railway Co., et al.

In the Dis[illegible] Court for the Fourteenth[illegible]udicial District of Texas, Dallas County.

TO SAID HONORABLE COURT:

Now comes the plaintiffs in the above entitled and numbered cause and object to the removal of this cause upon the defendant's application to the Circuit Court of the United States for the Northern District of Texas, for the following reasons:

(1) Because the plaintiffs have not the right to bring this suit in said Circuit Court of the United States for the Northern District of Texas.

(2) Because plaintiffs have not the right to bring this suit against the defendants, Slayter and Rasmusson, in the Circuit Court of the United States for the Northern District of Texas.

(3) Because plaintiffs have not the right to bring this suit against the defendant, Texas & Pacific Railway Company, in the Circuit Court of the United States for the Northern District of Texas.

(4) Because it appears from the plaintiffs' petition that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of either of the defendants, Slayter or Rasmusson.

(5) Because it appears from the plaintiffs' petition that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of the defendant, Texas & Pacific Railway Company.

(6) Because it appears from the plaintiffs' petition that this suit is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of all of the defendants herein.

(7) Because it appears from the defendants' petition for removal that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of either of the defendants, Slayter or Rasmusson.

(8) Because it appears from the defendants' petition for removal that this cause is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of the defendant, Texas & Pacific Railway Company.

(9) Because it appears from the defendants' petition for removal that this suit is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of all of the defendants herein.

Wherefore, plaintiffs pray that this cause be not removed to the Circuit Court of the United States for the Northern District of Texas, but that jurisdiction thereof be retained by this Court. CARDEN, STARLING & CARDEN,

Attorneys for Plaintiffs.

Filed September 12, 1907.

H. H. WILLIAMS, Clerk District Court.

By H. L. Petty, Deputy.

ORDER OVERRULING PETITION FOR REMOVAL.

Mrs. Mary Dunn, et al., No. 3030. vs. The Texas & Pacific Ry. Co., et al.

Tuesday, September 10, 1907. Entered as of September 9, 1907.

This cause coming on to be heard upon the joint petition of The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, to remove the same to the Circuit Court of the United States for the Northern District of Texas, and said petition being heard by the Court, and it appearing to the Court that the petition is in all things regular and filed in due time and that a good and sufficient bond has been filed, but that said petition does not show proper grounds for removal, the prayer of the said petitioners, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, for an order of removal of said cause to the Circuit Court of the United States for the Northern District of Texas is denied, to which order defendants except.

25

BILL OF COSTS.

Filing and docketing Petition	$ .35
Stenographic fee	3.00
Filing Transfer of Interest	.15
Filing Notice of Taking Oral Deposition of Slayter	.15
Issuing Precept and three copies and four copies of Notice to take deposition of Ford, et al	6.25
Issuing Citation and three copies	2.25
Sheriff Ledbetter serving Precept	2.25
Sheriff Ledbetter serving Citation	2.55
Filing Application for Commission	.15
Issuing Commission to take deposition of C. W. Slayter, C. Rasmusson and John Ford	.75
Filing deposition of C. W. Slayter, et al	.15
H. C. McCart, Notary, Fort Worth	...
Filing Petition for Removal	.15
Filing Bond for Removal	.15
Filing Answer and Entering Appraisement T. & P. Ry. Co	.30
Filing Answer and Entering Appraisement	.45
Filing Objection to Removal	.15
Entering Order Overruling Application for Removal	1.00
Entering Demand for Jury	.75
Jury Fee paid by Defendant	5.00
Issuing Commission and Filing Direct Interrogatory to Harritt, et al	.90
Filing ex-Interrogatories and Waiver	.30
Taxing Cost	.25
	$27.40
Fee for this Transcript	12.50
Total costs	$39.90

CLERK'S CERTIFICATE.

The State of Texas,
County of Dallas.

I, H. H. Williams, Clerk of the District Courts in and for the County of Dallas, State of Texas, do hereby certify that the above and foregoing twenty-four pages contain a true and correct transcript of all proceedings had in cause No. 3030, styled Mrs. Mary Dunn, et al.,

versus

T. & P. Ry. Co., et al.,

as same now appear of record and on file in my office in the City and County of Dallas, State of Texas.

To certify which I have hereunto set my official signature and affixed the seal of the said District Courts of Dallas County, Texas, at office in Dallas this, the 13th day of January, A. D. 1908. (Seal) H. H. WILLIAMS,

Clerk District Courts, Dallas County, Texas.

By S. T. Jackson, Deputy.

ENDORSED: No. 2493. Mrs. Mary Dunn, for herself and as next friend, vs. No. 3030, Texas & Pacific Railway Company, et al. From the District Court of Dallas County, Fourteenth Judicial District of Texas. Applied for by Flippen & McCormick, on the 9th day of September, A. D. 1907, and delivered to Flippen & McCormick on the 13th day of January, A. D. 1908. H. H. Williams, Clerk District Court Dallas County, by S. T. Jackson, Deputy. Filed 13th day of January, 1908. Louis C. Maynard, Clerk.

PLAINTIFFS' MOTION TO REMAND.
Filed January 20, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Mary Dunn, et al.,
vs.
Texas & Pacific Railway Company, et al.

Plaintiffs' Motion to Remand.

Now come the plaintiffs in the above entitled cause by their attorneys, Carden, Starling & Carden, and appearing specially for the purpose of this motion only, saving and reserving any and all objections which they and each of them have to the manifold imperfections in the mode, manner and method of removal papers, and expressly denying that this Court has jurisdiction of this cause, or of the plaintiffs or any of the plaintiffs therein, respectfully moves the Court to remand this cause to the District Court of the County of Dallas, State of Texas, for the Fourtenth District, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this Court, as appears from the following:

1. The defendants in this cause seek to remove the same because the suit arises under the laws of the United States, in that the Texas & Pacific Railway Company is incorporated under certain Acts of Congress. It does not appear from the record, and particularly from the petition to remove said cause, that any of the defendants are inhabitants of the Northern District of Texas, neither is there any denial in the record by any of the defendants of the allegation contained in plaintiffs' petition, that the defendants, Slayter and Rasmusson, are inhabitants of Harrison County, Texas, which county is in the Eastern District of Texas.

2. It appears upon the face of the record herein, that there is no separable controversy, as to either of the defendants herein, and that this suit as to the defendants, Slayter and Rasmusson, does not involve a Federal question, neither does it appear from the petition to remove the cause, that the said defendants, Slayter and Rasmusson, are citizens of any State other than the State of Texas, nor is there any allegation in such petition denying the allegation in plaintiffs' petition that they are citizens of the State of Texas, and that they are citizens of the same State of which plaintiffs are alleged to be citizens.

3. It appears upon the face of the record herein, that there is no separable controversy as to any of the defendants, and it does not appear from the petition to remove said cause, that each and all of said defendants are inhabitants of the Northern District of Texas, but, on the contrary, it appears from plaintiffs' petition that two of them, to-wit, Slayter and Rasmusson, are inhabitants of the Eastern District, which averment in said petition is not denied by any of the defendants.

4. It does not appear upon the face of the record herein that plaintiffs' petition alleges any cause of action arising under the Constitution or laws of the United States.

5. It appears upon the face of the petition to remove this cause, that the allegations of fraudulent misjoinder of the parties defendant do not show any acts or facts showing fraud, but simply state conclusions of said defendants, and that therefore the said allegations, to-wit, those contained in the fifth paragraph of said petition, are immaterial and irrelevant and constitute no grounds upon which a right to remove can be predicated.

6. The plaintiffs say that they are each and every one of them citizens of the State of Texas, and inhabitants of the Northern District of Texas; that the defendants, Slayter and Rasmusson, are each citizens of the State of Texas, and that

each of them is an inhabitant of the Eastern District of Texas, and that therefore the said defendants can not be sued by the plaintiffs in the Circuit Court of the United States for the Northern District of Texas, and that consequently neither of said defendants have any right to remove said cause to this Court, and that consequently said cause is not removable to this Court.

7. Plaintiffs say that the defendants, Texas & Pacific Railway Company, has its principal office and place of business in the City of New York, in the Southern District of New York, in the State of New York, of which district it is an inhabitant, and that it is not an inhabitant of the Northern District of Texas, and that it can not be sued by plaintiffs in the Northern District of Texas, by reason of its being a Federal corporation, consequently it has not the right to remove this cause to the Circuit Court of the United States for the Northern District of Texas.

8. The plaintiffs deny the averments contained in the petition of removal, wherein it is alleged that each and all of the acts of negligence of the defendants, Slayter and Rasmusson, contained in the plaintiffs' petition are falsely and fraudulently made for the purpose of avoiding the removal of this case and defrauding the Circuit Court of the United States of its right of jurisdiction herein. Plaintiffs allege that the said defendants, Slayter and Rasmusson, were guilty of the wrongs and acts of negligence set up and complained of in plaintiffs' petition against them, and aver that each and all of said allegations are made in good faith, for the purpose of obtaining a judgment against said defendants, by reason of said wrongs and acts of negligence. They, however, aver that by reason of said wrongs and acts of negligence, and by reason of said defendants, Slayter and Rasmusson, being made parties defendant to this suit, that the Circuit Court of the United States for the Northern District of Texas is rightfully deprived of

jurisdiction of this cause, and that by reason thereof there is no right to remove the same to this Court.

Wherefore plaintiffs say that the cause it not one within the original jurisdiction of this Court, and that this Court can not acquire jurisdiction by removal, and that the said cause should be remanded to the District Court of Dallas County, Texas, and plaintiffs pray that said cause be so remanded.

CARDEN, STARLING & CARDEN,
Attorneys for Plaintiffs.

ENDORSED: No. 2493, Law. In the Circuit Court of the United States for the Northern District of Texas, at Dallas. Mary Dunn, et al. vs. Texas & Pacific Railway Company, et al. Plaintiffs' Motion to Remand. Filed 20th day of January, 1908. Louis C. Maynard, Clerk. By C. B. Price, Deputy. Carden, Starling & Carden, Attorneys for Plaintiffs.

DEFENDANTS' ANSWER TO PLAINTIFFS' MOTION TO REMAND.

Filed April 22, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Mary Dunn, et al., vs. The Texas & Pacific Railway Company, et al.	No. 2493, Law.

Now come defendants, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, and in answer to the motion to remand filed herein by the plaintiffs, they say:

First—That the said motion to remand is insufficient in law and shows no sufficient cause why said suit should be remanded.

Second—Further replying to plaintiffs' motion to remand, defendants say:

(1) That said petition for removal recites that this is a civil suit of which the Circuit Court for the United States for the Northern District of Texas has been given jurisdiction, one of the essential elements of which would be residence of the removing defendant, and defendants say that The Texas & Pacific Railway Company is a resident and has its domicile in this district, and this they are ready to verify. The defendants, Slayter and Rasmusson, were jointly sued with The Texas & Pacific Railway Company, a resident of this district, at Dallas, Dallas County, within this district, said suit being instituted in a State Court under and by virtue of the venue laws of the State of Texas, and such joinder in said suit made this the Court of the proper district for the purpose of removal.

(2) No claim of separable controversy or diverse citizenship, but only the existence of a Federal question as to all of said defendants is involved in this removal, and, therefore, the second ground of the plaintiffs' motion is not applicable.

(3) The grounds of said motion to remand, as set out in the third paragraph thereof, involve the same question as presented in the first grounds to which defendants have made reply above.

(4) In reply to the fourth ground defendants say that the Court will take judicial knowledge of the Federal character of the defendant, The Texas & Pacific Railway Company, the record shows the joint liability charged as against the other defendants, which in law raises a Federal question as to all of said defendants.

(5) Replying to the sixth ground of plaintiffs' motion, defendants say that the citizenship of the defendants, so far as it affects the jurisdiction of the subject matter, is immaterial, since the Federal question that affects the Texas & Pacific Railway Company extends to the other defendants when jointly sued with it and jurisdiction is not dependent upon diverse citizenship.

(6) Replying to the seventh ground, the plaintiffs do not charge in their petition that the principal office of the Texas & Pacific Railway Company is in the City of New York, in the Southern District of New York, in the State of New York, and that it is an inhabitant of said district, and not of the Northern District of Texas, but said facts are charged for the first time in their said motion to remand, and are here denied by defendants, who assert that said defendant is a resident of said Northern District of Texas and has its domicile in same, and this defendants are ready to verify.

(7) Defendants further say that neither as a matter of law or as a matter of fact does there exist any sufficient reason

why this cause should be remanded to the State Court, and expressly deny the existence of any fact that would render the removal of this cause to this Court improper, and as to the existence of any such fact, or facts, they ask that said plaintiffs be required to make strict proof.

Wherefore defendants pray that said motion to remand be in all things overruled and denied.

FLIPPEN & McCORMICK,
Attorneys for Defendants.

ENDORSED: No. 2493. Mary Dunn, et al. vs. The Texas & Pacific Railway Company, et al. Defendants' Answer to Plaintiffs' Motion to Remand. Filed 22nd day of April, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy.

ORDER OVERRULING MOTION TO REMAND.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Dallas, Vol. 10, page 444. Entered May 30, 1908.

Mrs. Mary Dunn, et al.,
No. 2493. vs.
Texas & Pacific Railway Company, et al.

May 30, 1908.

This day came on to be heard the motion of the plaintiffs to remand this cause to the State Court, and the Court having heard said motion, the evidence and argument of counsel thereon and being fully advised in the premises, is of opinion that the said motion is not well taken; it is, therefore, ordered and adjudged by the Court that said motion be and the same is hereby in all things overruled and refused; to which action of Court the plaintiffs then and there in open court excepted.

BILL OF EXCEPTIONS.

Filed June 8, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Mary Dunn, et al.,
vs.
Texas & Pacific Railway Company, et al.

No. 2493.

Be It Remembered, That on this the 23rd day of May, 1908, at the May term of this Court, begun and holden in Dallas, in and for the Northern District of Texas, before the undersigned District Judge, there came on to be heard the plaintiffs' motion to remand this cause to the District Court of Dallas County, Texas, from whence it had been removed by the defendants herein; and thereupon the plaintiff offered L. S. Thorne as a witness, who, being duly sworn, testified as follows:

Direct Examination.

(By Mr. Starling.)

Q. Your name is L. S. Thorne?

A. Yes, sir.

Q. You live in Dallas, do you?

A. Yes, sir.

Q. And you are first vice-president of the Texas & Pacific Railway Company?

A. I am senior vice-president. For many years my title was first vice-president, but some two years ago—I think it was about that long, they did away with the—they changed the title. I am senior vice-president now.

Q. How long have you been first vice-president and senior vice-president?

A. Twelve or fifteen years, I would say.

Q. Who is the president of the Texas & Pacific?

A. George J. Gould.

Q. Where does he reside?

A. New Jersey; I think he claims his residence—Lakewood.

Q. Who is the secretary and treasurer?

A. C. E. Satterlee.

Q. Where does he reside?

A. New York.

Q. The Texas & Pacific Railway Company maintains an office in New York City, does it not?

A. Yes, sir.

Q. What is the number, the street and number in which the office is maintained?

A. 195 Broadway.

Q. Who is the custodian of the by-laws of the Texas & Pacific Railway Company?

A. Well, each of the—these officers here in Dallas, the secretary and treasurer; in fact, all of the officers of the road have a copy of the by-laws.

Q. Have you a copy of them with you?

A. Yes, sir.

Q. Is there a by-law that fixes the place of holding the meetings of the directors and stockholders of the Texas & Pacific Railway Company?

A. There can—perhaps without—maybe I can give you the information that you want in a little different way, if you will permit me, not answering your question just as it is put. Our annual meetings are held the third Wednesday in March—

Q. Is there a by-law that fixes the place?

A. I think so.

Q. Will you turn to that by-law

A. Might I answer that question possibly in a little different way; I might answer it better if you will permit me to depart a little from the form of the question just as it is asked, and still give you—

Q. I have no objection.

A. Our annual meetings and for many years have been called in New York; then they adjourn to meet in Texas, and whatever action is taken at the New York meeting, under our rules, have to be ratifide and confirmed by the annual meeting at Dallas. That has been the custom for many years.

Q. Have you a by-law that covers that matter

A. Yes, I think I can turn to it.

Q. Turn to it, please, and read it to the Court.

A. (Witness reads.) "Section 1. The annual meeting of the stockholders of this company for the transaction of such business as may legally come before them, shall be held at the office of the company, in the City of New York, on the third Wednesday in the month of March, in each year."

Q. Is there any other by-law bearing upon that question?

A. (Witness reading.) 'Special meetings of the stockholders of this company may be called by the president, or in his absence, or in case of his incapacity to act, by the vice-president, or by the board of directors, at any time, to be held in the office of the company, in New York, or in such other place as they may lawfully meet, upon the usual notice of fourteen days."

Q. Is there any other by-law bearing upon that question of where they shall meet?

A. I don't think so. I am not quite positive. It is all here. I have glanced over it hurriedly.

Q. Now, Mr. Thorne, who is the custodian of the stock register and stock book of the Texas & Pacific?

A. The secretary, Mr. Satterlee. Our transfer book is kept in New York, but we have an assistant secretary here who receives stock, has it registered, etc.

Q. But the principal stock book is kept in New York?

A. The transfer—stock book is kept in New York by Mr. Satterlee; like nearly all large corporations in this country, they keep their transfer book in the City of New York.

Q. And you say you have an assistant secretary here?

A. Assistant secretary and treasurer; yes, sir.

Q. Who is that?

A. Mr. Lewis S. Smith.

Q. And he also keeps a stock book here?

A. No, sir. As I stated, the transfer book is kept in New York. He has his record here, and receives stock here to be registered—sends it to New York to be registered.

Q. The transfer book is in New York, in the custody of Mr. Satterlee?

A. Yes, sir.

The Witness: Can I say only one word that maybe may be helpful to you?

Mr. Starling: I have no objection.

The Witness: For many years the corporation has designated Dallas as the general office of this company, and I wish to refer you to any of our annual reports. The office of the company is designated in this way: "General offices, Dallas, Texas. New York office, 195 Broadway, New York."

Q. That is to the same effect that you have it here on your time cards, is it? It says here: "General offices, New York, N. Y., Dallas, Texas" (showing witness paper).

A. I don't remember; but here is a copy—

Mr. Starling: We have no objection. Have you any, Mr. Hall.

M. Hall: None at all.

The Witness: The literature, practically all of it, has, "General offices, 195 Broadway and Dallas, Texas." Whenever it would be referred to in any of our annual reports, and any official papers you will find it, the Dallas office is designated as the general office.

Q. That is, just as it is here?

The Witness: I wish to make it quite clear to you, if I may be permitted to do so. Since the recent laws took effect in this territory, that our annual meeting, which is called in New York, they simply meet and bring up such matters as come before them, but that meeting then adjourns—for at least fifteen years, more than fifteen years—that meeting then adjourns to meet in Dallas, Texas, where all the acts or any action taken by the New York meeting is confirmed by the Dallas meeting before it is considered effective.

Mr. Starling: That's all.

Witness: Thank you.

Cross Examination.

(By Mr. Hall.)

Q. Just want to ask this question, if Mr. Thorne doesn't sign up stock. Do you or do you not sign stock for the company here?

A. For quite a number of years I have signed all the stock and bonds and all official papers, but within the last few months we have a vice-president now located at 195 Broadway, and he probably would sign any stock now, if he was in this territory, or in the United States at the time they required additional stock to be signed, but that was only a few months ago. For a number of years I have signed the stock and all papers officially.

Q. Is there a seal kept here in Mr. Smith's office?

A. Yes, sir.

Q. How is it used? Is it used here?

A. It is used in any cases where a seal is necessary on any papers.

Q. Just as it would be used in New York?

A. Yes, sir.

Mr. McCormick: Do you sign deeds and papers of that kind here in Dallas?

A. For a great many years, yes. I wouldn't say that I have always signed all deeds, but nearly all at least. Some signed by Mr. Abrams—

Q. Where is the land department of the Texas & Pacific located?

A. Dallas.

Q. And you have a resident commissioner here to attend to all land business?

A. Yes, sir; Mr. Abrams.

Q. You say you are senior vice-president; what portion of the time do you act as president of the road?

A. As president and general manager, all of the time. Have no other business.

Q. Does the president, Mr. Gould, give his personal attention to the ordinary affairs of the corporation as conducted here in Texas?

A. Well, this is a little bit of a hard question to answer, and give you what you want to cover. Take last year, for instance, the president was out of the United States for six or eight months and all matters coming up were acted on at home.

Q. All the main operating officials are here in Dallas?

A. Yes, sir.

Q. What are the principal offices you have here?

A. All of the operating officers are here—the auditor, the general freight and passenger agents, general manager, assistant secretary and treasurer and the rest of them.

Q. All of the active general officers of the road, except the president and secretary, are here in Dallas, are they not?

A. Yes. There is a vice-president located in New York now, but he is inactive.

Re-Direct Examination.

(By Mr. Starling.)

Q. This seal that you keep here, is that a copy of the seal that is kept in New York?

A. Yes, sir; the official seal of the company.

Q. You have two of them, then, one here and one in New York?

Q. And these stock certificates which you sign in your official capacity, they are either sent to you by the New York office and returned, or else handed to you by the assistant secretary here, and you sign them and they are subsequently transmitted to the New York office?

A. Yes, sir.

Q. And you don't sign stock certificates now that they are signed by the other vice-president in New York?

A. I want to answer the question just as it is asked me. I made that broad enough that if he was in New York, and he was there, possibly he would sign it, but I am not certain about that. That is Mr. Huntsman, and he is the second vice-president or junior vice-president, but is also located in the general offices of the company in New York, and now as they have such an official there, if there was any new stock to be signed up, and he was there, I presume he would sign the stock. I don't know that he would.

Q. He has the authority to do so?

A. Yes, he would be authorized to.

Mr. McCormick: You would have the same authority here, Mr. Thorne, would you not?

A. Yes.

Q. To sign any stock that was presented to you for signature?

A. Yes, sir; I have signed all of it for a great many years.

And no other or further testimony was offered by either party, and after the argument of counsel, and thereafter at a subsequent day of said term of said Court, to-wit, on May 30, 1908, the said motion to remand was overruled and the plaintiff excepted to said order of the Court overruling said motion and then and there prayed that his bill of exceptions might be sealed, and upon due consideration said bill of exceptions is sealed, approved, allowed and ordered filed as a part of the record in this case.

Dated at Dallas, Texas, this 8th day of June, 1908.

E. R. MEEK,
District Judge.

The plaintiff in the above entitled cause respectfully prays that the foregoing bill of exceptions be approved.

CARDEN, STARLING & CARDEN,
Attorneys for Plaintiff.

We have no objections to the approval of the foregoing bill of exceptions.

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Attorneys for Defendant.

O. K. T. B. McCormick.

ENDORSED: No. 2493. Mary Dunn, et al. vs. Texas & Pacific Railway Company, et al. Bill of Exceptions. Filed June 8, 1908. Louis C. Maynard, Clerk.

CLERK'S CERTIFICATE.

I, Louis C. Maynard, Clerk of the Circuit Court of the United States for the Northern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and correct copy and transcript of the record and of all proceedings in cause No. 2493, Law, now pending upon the docket of aforesaid Court, wherein Mary Dunn, et al., are plaintiffs, and The Texas & Pacific Railway Company, et al., are defendants, as fully as the same remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said Court, at Dallas, Texas, this 26th day of December, A. D. 1908.

(Seal) LOUIS C. MAYNARD, Clerk.

By Geo. W. Mitchell, Deputy.

THE TEXAS & PACIFIC RY. CO.
vs.
MRS. MARY DUNN ET AL.

CASE NO. 2511.
IN EQUITY.

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BILL OF COMPLAINT.

Filed March 25, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

The Texas & Pacific Railway Company, et al., vs. Mrs. Mary Dunn, et al.	In Equity.

To the Honorable Judges of the Circuit Court of the United States in and for the Northern District of Texas:

The Texas & Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the United States, with its principal office in the City of Dallas, Dallas County, Texas, and within the Northern District of said State, and being a resident and having its domicile in the said City of Dallas, Dallas County, Texas, and within the Northern District of Texas, and C. W. Slayter, a resident and inhabitant of Harrison County, Texas, situate within the Eastern District of Texas, and Carl Rasmusson, a resident and inhabitant of Harrison County, Texas, within the Eastern District of Texas, bring this their bill of complaint against Mrs. Mary Dunn, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, the said Mary Dunn being the mother and natural guardian of the said Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, all of whom are minors, all of whom reside and are citizens and inhabitants of the City

of Dallas, Dallas County, Texas, within the Northern District of said State, and

Thereupon your Orators complain and say:

That the defendant herein, Mrs. Mary Dunn, for herself and as next friend for her minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, did on the 1st day of August, 1907, in the Fourteenth District Court of Dallas County, Texas, file a suit against complainants, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, and in said suit sought to recover of said defendants damages in the sum of Twenty-five Thousand ($25,000.00) Dollars in her own behalf and in the sum of Fifteen Thousand ($15,000.00) Dollars in behalf of said Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, growing out of the alleged negligent killing of J. J. Dunn by said defendants, the said J. J. Dunn being the husband of Mary Dunn and the father of the other defendants herein. In said suit so instituted, as above shown, it was alleged, in substance, that the said J. J. Dunn, while using, as a licensee, the track upon which a certain train of The Texas & Pacific Railway Company was being operated by C. W. Slayter as engineer and Carl Rasmusson as fireman, at a point on Pacific Avenue near Race and College Avenue, in the City of Dallas, on July 15th, was struck and killed by said locomotive so operated, and that said accident and resulting death were brought about by the joint negligence of the said The Texas & Pacific Railway Company and its said operatives in charge of said engine, C. W. Slayter and Carl Rasmusson.

That thereafter, to-wit, on the 9th day of September, 1907, the said defendants, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, before the time they were required by law to file their answers in said cause in the State Court, filed therein their joint petition and bond for removal of said cause to the Circuit Court of the United States for the

Northern District of Texas, said petition for removal being based upon the following facts: That said suit was one arising under the laws of the United States, the said defendant, The Texas & Pacific Railway Company, being created by Act of Congress, and said suit involved more than Two Thousand ($2,000.00) Dollars, and all of the defendants joined in said petition for removal. It was also in said petition for removal alleged that the defendants, C. W. Slayter and Carl Rasmusson, the engineer and fireman respectively of the train alleged to have caused the death of J. J. Dunn, were at the time of said accident and at the time of filing said petition, men of very moderate estate, who were unable to respond in damages, and that in the operation of said train, they had acted simply under orders from their superior, the said The Texas & Pacific Railway Company, and that said company, and it alone, was solely responsible and accountable for any and all damages that may have resulted to the plaintiffs, if in fact any one was liable at all, and that said defendants, C. W. Slayter and Carl Rasmusson, were not guilty of the wrongs and acts of negligence set up and complained of in the plaintiffs' petition against them, and that each and all of said allegations were falsely and fraudulently made for the purpose of avoiding the removal of said cause and defrauding the Circuit Court of the United States of its rightful jurisdiction of said cause upon said application and bond being filed and duly presented to the State Court; that thereafter, on, to-wit, September 12, 1907, the said plaintiffs in the State Court filed therein objections to the removal of said cause to the Circuit Court of the United States, said objections being numbered one to nine and being based upon an alleged want of jurisdiction of parties and subject matter to entitle the defendants in said suit to a removal to said Circuit Court of the United States for the Northern District of Texas, and thereafter, on the 10th day of September, said petition for removal and objections came on for hearing

in the State Court, and on said date an order was made and entered as of September 9, 1907, overruling the petition for removal, the said order reciting that the petition was in all things regular and filed in due time and that a good and sufficient bond had been filed, but that said petition did not show proper grounds for removal, to which order the defendants, The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, excepted, and thereafter, to-wit, on the 13th day of January, 1908, in compliance with the terms and conditions of said bond, and in pursuance of the statutes of the United States allowing and regulating removals from the State Courts, said defendants in said original suit filed in the Circuit Court of the United States for the Northern District of Texas a certified copy of the record in said cause, the said defendants having, as shown by said transcript, filed their answers to said suit in the State Court subject to their petition and bond for removal to the Circuit Court. That thereafter, on the 20th day of January, 1908, after the transcript in said cause had been filed and docketed in the Circuit Court of the United States for the Northern District of Texas, before said cause came on for trial in said Circuit Court, the defendants herein appeared in said Circuit Court of the United States and on the 20th day of January, 1908, filed therein their motion to remand. Said motion is now a part of the records of this Court in said cause of Mary Dunn et al. vs. The Texas & Pacific Railway Company et al., being No. 2493 at Law, and the same set up various grounds, the same being numbered one to eight, inclusive, the substance of said grounds being want of jurisdiction of the Circuit Court, both as to parties and subject matter, and denying that said cause was, or is, a removal one, and denying the averments contained in the petition for removal, wherein it is alleged that each and all of the acts of negligence charged against Slayter and Rasmusson contained in the plaintiffs' petition were falsely and fraudulently made for the

purpose of avoiding a removal of the cause and defrauding the Circuit Court of its rightful jurisdiction.

That the said cause is at this time pending upon the docket of said Circuit Court of the United States for the Northern District of Texas, the jurisdiction of said Court having become fixed by the filing of said petition and bond in the State Court in due time, and by the taking out and filing of said transcript and the entering of said suit upon the docket of the said Circuit Court, and the question as to the jurisdiction of said Circuit Court, which has been raised by the motion of the plaintiffs in said suit to remand said cause, is a pending motion before said Circuit Court of the United States, and has at this time in no manner been acted upon or determined.

Your relators respectfully show that the said Circuit Court of the United States is the only tribunal at this time that has a right to entertain jurisdiction of said cause, and that there is no other tribunal in which the said plaintiffs in said cause may lawfully prosecute their suit until, and unless, the said Circuit Court shall determine, upon consideration of said motion to remand, that the removal had was wrongful and that, therefore, jurisdiction did not vest in said Circuit Court, or that it can not, after satisfying itself upon the issue thus raised by said motion to remand, longer retain jurisdiction of said cause; but notwithstanding the fact that said Circuit Court, from and after the filing of said petition and bond in the State Court, was the only tribunal vested by law with authority to entertain jurisdiction, or to inquire into the jurisdiction of said Circuit Court over the said suit so removed from the State Court to it, the said State Court, after the overruling of your relator's petition for removal, has continued to allow said cause to remain upon its docket and has made an order assigning said cause for trial on the 26th day of March, A. D. 1908, and the said plaintiffs in said cause, by and through their attorneys, are at this time preparing, and, unless restrained by

the order of this Honorable Court, will upon said date proceed to prosecute their said suit against your relators as defendants therein in said Fourteenth District Court.

Your relators further show that the said defendants are now prosecuting said original suit in the said Fourteenth District Court of Dallas County as if no removal of said cause had been had, and before said Circuit Court of the United States for the Northern District of Texas has in any manner acted upon its own jurisdiction; that your relators herein, by their removal of this cause to the Circuit Court of the United States, acquired a right to have said cause of action adjudicated in said Circuit Court, or at least to have this Court pass upon its jurisdiction in said cause before they shall be compelled to answer further to said cause in the Court from which the same was removed, and that by said threatened continued prosecution of said suit in the State Court not only the rights of your relators are being set at naught, but the jurisdiction of this Court is being, and will be, ignored, if the same shall be permitted; that by seeking to ignore the removal of said cause to this Court and by compelling your relators, as defendants, to appear and defend said suit in the State Court they are being harassed and subjected to additional cost in conducting their defense in two separate proceedings. That the jurisdiction in said Circuit Court of the United States over said cause of action is full and complete, and all of the rights that the plaintiffs in said suit seek can be adjudicated in said Circuit Court, whereas the jurisdiction in said State Court was, and is, at an end from the time the petition and bond for removal were filed and presented to said Court, and the continued prosecution of said suit therein is an unwarranted harassment of your relators and is subjecting them to additional and unnecessary costs.

Your relators show to the Court that the amount of the damages sustained, and likely to be sustained, by relators by

reason of the prosecution of said suit in the District Court of Dallas County are not susceptible of exact computation, but the same have been and will hereafter inevitably amount to a large sum, and the right of removal of relator, The Texas & Pacific Railway Company, by reason of its being a Federal corporation, in cases of this character, is a valuable one, and the damage that will be sustained by it alone, in case it shall be deprived of its right of removal in cases of this character, is largely in excess of the sum of Two Thousand Dollars, and that said suit now being prosecuted in the State District Court is vexatious and unnecessary and has no lawful status and is in derogation of the rights of your relators and is a wilful refusal on the part of the said plaintiffs to recognize the jurisdiction of the said Circuit Court, or to abide its decision as to its own jurisdiction, and that the further prosecution of said suit in the State Court at this time is contrary to equity and good conscience.

For as much as your relators can have no adequate relief except in this Court, and to the end therefore that their said rights may be maintained and that the jurisdiction of this Court may be protected and enforced and that the defendants herein may, if they can, show cause why the relief herein sought should not be granted, your relators pray that the said defendants, Mary Dunn, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, be decreed to make answer to this bill of complaint, according to the rule of a court of equity, and your relators pray that your Honors may grant a writ of injunction issuing out of and under the seal of this Honorable Court, enjoining and restraining the said defendants, their clerks, agents, attorneys and servants, and those claiming under them, from further prosecuting their said suit against relators in the said Fourteenth District Court of Dallas County, Texas, as long as this cause shall be rightfully upon the docket of said Circuit Court of the United

States, or until said Court shall order that the same shall be remanded to said District Court, and that such injunction be made perpetual.

And your relators pray for such other relief as the equity of the case may require and to your Honors may seem mete.

May it please your Honors to grant unto your relators not only the preliminary injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America directed to the said Mary Dunn, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, commanding them on a day certain to appear and answer to this bill of complaint and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

THE TEXAS & PACIFIC RAILWAY CO.
C. W. SLAYTER.
CARL RASMUSSON.

By Flippen & McCormick, Counsellors for Complainants.

State of Texas, }
County of Dallas. }

Before me, Freeman Hall, a notary public in and for Dallas County, Texas, on this day personally appeared J. W. Everman, who, being by me duly sworn, on his oath deposeth and saith that he is the agent of The Texas & Pacific Railway Company, one of the above named complainants, being its assistant general manager; that he has authority to make this affidavit; that he has read the foregoing bill of complaint and is acquainted with the contents thereof and the allegations of said bill are true, except as to such matters as are stated upon information

and belief, and that as to such matters he believes the same to be true. J. W. EVERMAN.

Sworn to and subscribed before me, this 25th day of March, A. D. 1908. FREEMAN HALL,
(Seal) Notary Public, Dallas County, Texas.

ENDORSED: No. 2511, in Equity. The Texas & Pacific Railway Company, et al. vs. Mrs. Mary Dunn, et al. Bill of Complaint. Filed 25th day of March, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy.

ORDER GRANTING TEMPORARY INJUNCTION.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Dallas, Volume 10, page 396. Entered March 25, 1908.

The Texas & Pacific Railway Company, et al. vs. Mrs. Mary Dunn, et al. } No. 2511, in Equity.

Whereas, in the above named cause it has been made to appear upon the bill of complaint filed herein and the affidavit of J. W. Everman annexed thereto, which have this day been exhibited to the Court in chambers at Dallas, that a preliminary injunction is proper, and that, prima facie, the complainants are entitled thereto, enjoining the defendants herein from the acts complained of and threatened to be committed.

Now, upon the prayer of said complainants, it is ordered that the defendants appear before the Circuit Court of the

United States for the Northern District of Texas, at the court room of said Court at Dallas, upon the 4th day of May, A. D. 1908, at 10 o'clock a. m. of said day, then and there to show cause, if any they have, why the injunction therein prayed for should not issue; and it appearing to the undersigned Judge of said Court that there is danger of irreparable injury being caused to the complainants before the hearing of said application for the injunction, as prayed for, can be heard, unless the defendants are, pending such hearing, restrained as hereinafter set forth:

Therefore, complainants' application for a temporary injunction is granted upon their giving a bond with two good and sufficient sureties to be approved by the clerk of this Court, in the penal sum of $1,000.00 securing the said defendants against all loss or damages which may result from the issue of said order, if it should be finally determined that the same was improperly issued, or that may be awarded to them by reason of the granting of said order.

Now, therefore, it is ordered that you, the said Mrs. Mary Dunn, for yourself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, and said minor children themselves, defendants herein, your agents, servants and attorneys and all persons acting by or under your authority or direction, or in your behalf, be, and you are hereby, specially restrained and enjoined from further in any manner prosecuting in the Fourteenth District Court of Dallas County, Texas, your cause of action now pending on the docket of said Court against The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, the complainants herein, until the further order of this Court.

It is further ordered that a copy of this order, certified under the hand of the Clerk and seal of this Court, be served on the defendant, Mrs. Mary Dunn, for herself, and as next

friend for said minor children, the defendants to be restrained thereby.

Dated at Dallas, March 25th, in the Northern District of Texas, this the 25th day of March, A. D. 1908.

EDWARD R. MEEK,
United States District Judge.

RESTRAINING ORDER AND ORDER TO MRS. MARY DUNN TO SHOW CAUSE.

Issued March 25, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

The President of the United States of America—

To Mrs. Mary Dunn, for herself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn:

Whereas, in a certain cause now pending on the docket of our said Court, No. 2511, in Equity, wherein The Texas & Pacific Railway Company, and C. W. Slayter and Carl Rasmusson are complainants, and Mrs. Mary Dunn, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn are respondents, our said Court upon the 25th day of March, A. D. 1908, has made and allowed that certain order, a duly certified copy of which is hereto attached, and is hereby referred to;

Now, therefore, it is ordered that you, the said Mary Dunn, far yourself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, and said minor children themselves, defendants in said cause, your agents, servants and attorneys, and all persons

acting by or under your authority, or direction, or on your behalf, be, and you are hereby, specially restrained and enjoined from further in any manner prosecuting in the Fourteenth District Court of Dallas County, Texas, your cause of action now pending on the docket of said Court against The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, the complainants herein, until the further order of this Court.

It is further ordered that you, the said Mary Dunn, for yourself and as next friend for the said minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, do be and appear before the Honorable Circuit Court of the United States for the Northern District of Texas, at the court room of said Court at Dallas, upon the 4th day of May, A. D. 1908, at 10 o'clock a. m., of said day, then and there to show cause, if any they have, why the injunction prayed for should not issue.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the said Court hereon impressed, at Dallas, Texas, this the 25th day of March, A. D. 1908. (Seal) LOUIS C. MAYNARD, Clerk.

By Geo. W. Mitchell, Deputy.

ENDORSED: Original. Marshal's Docket No. 2058. No. 2511. The Texas & Pacific Railway Company, et al. vs. Mrs. Mary Dunn, et al. Restraining Order and Order to Mrs. Mary Dunn to Show Cause. Issued March 25, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy. Filed 26th day of March, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy.

MARSHAL'S RETURN.

Received this restraining order and order to show cause, at Dallas, Texas, on the 25th day of March, 1908, and executed the same on the 25th day of March, 1908, at Dallas, Texas, by delivering to the within named Mrs. Mary Dunn, for herself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, in person a true copy of this writ. GEO. H. GREEN,

By R. M. Warden, Deputy. U. S. Marshal.

SUBPOENA.

Issued March 25, 1908.

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

The President of the United States of America—

To Mrs. Mary Dunn, for herself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn—Greeting:

Your are hereby commanded to appear personally before the Honorable Circuit Court of the United States for the Northern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Dallas, Texas, in and for said circuit, on the first Monday of May next, or whensoever the said Court shall be there, to answer a bill exhibited against you, said Mrs. Mary Dunn, for yourself and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, by The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, and to do further and

receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty of Two Hundred and Fifty Dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Circuit Court of the United States for the Northern District of Texas, at the City of Dallas, this 25th day of March, 1908, and of the Independence of the United States of America, the 132d year. (Seal) LOUIS C. MAYNARD,

Clerk U. S. Circuit Court, Northern District of Texas.

By Geo. W. Mitchell, Deputy.

The defendant, Mary Dunn, for herself and as next friend for said minor children, is required to enter an appearance in the above suit, in the Clerk's office, on or before the first Monday of May, next, otherwise the bill will be taken as confessed. LOUIS C. MAYNARD, Clerk.

By Geo. W. Mitchell, Deputy.

ENDORSED: No. 2511, Chancery. In the U. S. Circuit Court, Dallas, Texas. The Texas & Pacific Railway Company, et al vs. Mrs. Mary Dunn, et al. Subpoena in Chancery. Issued March 25, 1908. Returnable May rules, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy. Returned and filed 26th day of March, A. D. 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy.

MARSHAL'S RETURN.

Received this writ on the 25th day of March, 1908, and I executed the same on the 25th day of March, 1908, by delivering to the within named defendant, Mrs. Mary Dunn, for her-

self and as next friend for the minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, at Dallas, Texas. in person a true copy of this writ.

GEO. H. GREEN,
U. S. Marshal, N. D. T.

By R. M. Warden, Deputy.

DEFENDANTS' DEMURRER.

Filed May 18, 1908.

IN THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Texas & Pacific Railway Company,
vs.
Mrs. Mary Dunn, et als.

In Equity.

The joint and several demurrers of Mrs. Mary Dunn for herself and as next friend for her minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, to the bill of complaint, of the Texas & Pacific Railway Company, the above named complainant:

These defendants, by protestation, not confessing or acknowledging, all or any of the matters or things in the complainants' bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer show that the complainant has not, in and by its said bill, made or stated such a case as does or ought to, entitle it to any such relief as is thereby sought and prayed for, from or against these defendants.

Wherefore, and for divers good causes of demurrer appearing in the said bill, these defendants doth demur thereto

and humbly demand the judgment of this Court, whether they shall be compelled to make any other or further answer to said bill, and pray to be dismissed with their costs and charges in this behalf most wrongfully sustained.

MARY DUNN,

For herself and as next friend of Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn.

By Carden, Starling & Carden, Their Attorneys.

CARDEN, STARLING & CARDEN,
Solicitors for Defendants.

I, C. W. Starling, one of the attorneys for the above named defendants, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

C. W. STARLING.

State of Texas,
County of Dallas.

I, Mrs. Mary Dunn, one of the defendants in the above entitled cause, solemnly swear that the foregoing demurrer is not interposed for delay.

MRS. MARY DUNN.

Subscribed and sworn to before me, by the said Mrs. Mary Dunn, this 8th day of May, A. D. 1908.

(Seal) B. B. HEMPHILL,
Notary Public, Dallas County, Texas.

ENDORSED: No. 2511 Eq. In the Circuit Court of the United States for the Northern District of Texas, at Dallas. Texas & Pacific Railway Company vs. Mrs. Mary Dunn, et als. Defendants' Demurrer. Filed 18th day of May, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy.

DEFENDANTS' MOTION TO DISSOLVE INJUNCTION.
Filed May 18, 1908.

IN THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Texas & Pacific Railway Company, vs. Mrs. Mary Dunn, et als.	In Equity.

To the Honorable Judges of said Court:

Comes now, Mary Dunn, for herself and as next friend of her minor children, Walter Dunn, George Dunn, James Dunn, Ancel Dunn and Amanda Dunn, and pursuant to order of Court heretofore made, shows the following causes why the injunction heretofore granted in this cause should not be continued pending final hearing, and also assigns the following reasons why the injunction heretofore granted should be dissolved:

(1) The bill of complaint filed herein does not show any reason why an injunction should be granted herein.

(2) The petition to remove the case of Mrs. Mary Dunn, et als. vs. Texas & Pacific Railway Company, from the Fourteenth District Court of Dallas County, Texas, which said suit is referred to in the bill of complaint filed herein, and which petition was filed in the said District Court of Dallas County, Texas, does not upon its face show that said cause is removable to this Court over an objection of the defendants which said objection was interposed in the State Court as set forth in said bill of complaint, and which said objection has been renewed in this Court by filing a motion herein to remand said cause to the State Court.

(3) It does not appear from the record filed in this Court in the primary cause of Mrs. Mary Dunn, et als. vs. The Texas & Pacific Railway Company, et al., that the plaintiffs could have instituted said suit and maintained jurisdiction thereof in this Court except by the consent of the defendants, and it therefore follows that this cause is not removable to this Court except by consent of these defendants, the plaintiffs in said suit, which consent has not been given, but which has been expressly withheld.

(4) These defendants respectfully show that after said State Court had denied the application of the defendants in said primary cause to remove the same to this Court, the said defendants entered their appearance in the said State Court cause and filed an answer thereto; that before said answer was so filed and before the transcript of said cause from the State Court was filed in this Court, and before the injunction herein was granted, the plaintiffs proceeded in due form, commission being waived, to take and cause to be returned to the Clerk of said State Court the depositions of the defendants, Slayter and Rasmusson, who were engineer and fireman of the train referred to in the bill of complaint; that said depositions are on file in said Court; that the said parties are still in the employ of the Texas & Pacific Railway Company; that the testimony adduced by said depositions is material in this case, in that among the allegations in plaintiffs' petition is one which charges the said engineer and fireman with having discovered the perilous position in which decesead was placed in time to have stopped the train before killing him, provided they had exercised ordinary care in using the means at hand for stopping such train, and which charges that they could have so stopped such train by using said means at hand with safety to themselves and to the train and the person thereon, in time to have prevented the killing of deceased. And the depositions thus taken show when and where the said engineer

and fireman first saw the deceased, and tend to prove that they could have so stopped said engine and train. These defendants say that they know of no other source from which such proof can be made, and they submit that to deprive them of the right to proceed in such State cause after the defendants have answered therein and after said depositions have been taken, is to deprive them of a valuable right and is unjust and inequitable. They further show that they have, at considerable expense, so taken the depositions of J. F. Harritt and Bert Woodard, and that the testimony thus taken tends to show that said engineer and fireman could have so stopped said train. These defendants further submit that to deprive them of the use of this testimony works a great hardship and is unjust and inequitable.

Wherefore they pray that said injunction be dissolved or in the event this Court should be of the opinion that the said injunction should be continued, that the order continuing it be modified so that the same shall be contingent upon the said defendants, Texas & Pacific Railway Company, Slayter and Rasmusson, giving their consent to the use of the said depositions in this cause the same as if they had been taken by virtue of a commission issuing out of this Court.

CARDEN, STARLING & CARDEN,
Attorneys for Defendants.

State of Texas,
County of Dallas.

I, C. W. Starling, one of the attorneys of the defendants in the above entitled cause, do solemnly swear that the statements made in paragraph No. 4 of the foregoing motion are true.

C. W. STARLING.

Subscribed and sworn to before me, this 8th day of May, A. D. 1908.

B. B. HEMPHILL,
Notary Public, Dallas County, Texas.

ENDORSED: No. 2511 Eq. In the Circuit Court for the Northern District of Texas, at Dallas. Texas & Pacific Railway Company vs. Mrs. Mary Dunn, et als. Defendants' Motion to Dissolve Injunction. Filed 7Tth day of May, 1908. Louis C. Maynard, Clerk. By Geo. W. Mitchell, Deputy.

COMPLAINANTS' ANSWER TO DEFENDANTS' MOTION TO DISSOLVE INJUNCTION.

Filed June 8, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

The Texas & Pacific Railway Company, et al., vs. Mrs. Mary Dunn, et al.	No. 2511, in Equity.

To the Honorable Judges of the Circuit Court of the United State for the Northern District of Texas:

Come now The Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmusson, complainants, and by way of opposition and answer to plaintiffs' motion to dissolve the injunction heretofore granted, they say:

1. That the rightful jurisdiction of this Court has heretofore been passed upon upon a motion to remand made by the plaintiffs in the case of Mrs. Mary Dunn, et al. vs. The Texas & Pacific Railway Company, et al., which is here expressly pleaded in answer to sections 1, 2 and 3 of the defendants' answer.

2. Complainants further show to this Court that after the State Courts had refused to remove said cause of Mary Dunn, et al. vs. The Texas & Pacific Railway Company, et al., that the complainants herein, the defendants in said cause, in filing answers in said Court expressly stated in said answers that said answers were made under protest and without in any manner waiving their right or insistence upon their right to a removal of said cause to this Honorable Court.

3. They further show to this Honorable Court that the depositions of Slayter and Rasmusson were taken with a distinct understanding and agreement between counsel for plaintiffs and defendants in said suit of Mary Dunn, et al. vs. The Texas & Pacific Railway Company, et al., and the rights of said defendants to a removal of said cause was to be in nowise prejudiced by the taking of said depositions and that the same was not to affect in any manner the question of removal, or was there to be any right that the depositions might be used in the United States Circuit Court, in case the cause should be removed thereto; that this understanding obtained as to all of the deposition testimony taken in said cause of Mary Dunn, et al. vs. The Texas & Pacific Railway Company, et al.

4. Complainants further represent to this Court that they have never waived or ceased to insist upon their right to remove said cause of Mary Dunn, et al. vs. The Texas & Pacific Railway Company, et al., to this Court, and that any expense that the defendants herein may have incurred in said cause was done with a full knowledge that the defendants were insisting upon their right to remove this cause and have it tried in this Honorable Court.

Wherefore, complainants pray that the Court will overrule the motion to dissolve the injunction heretofore granted and will perpetually enjoin the defendants herein, plaintiffs in said cause of Mary Dunn, et al. vs. The Texas & Pacific Railway

Company, et al., from further prosecuting or attempting to prosecute said cause in the State Court from which the same has been removed.

T. B. McCORMICK,
Solicitor for Complainants.

State of Texas,
County of Dallas.

I, T. B. McCormick, attorney for the complainants in the above entitled cause, do solemnly swear that the statements made in paragraphs Nos. 2, 3 and 4 of the foregoing answer are true.

T. B. McCORMICK.

Sworn to and subscribed before me, this 6th day of June, A. D. 1908. (seal)

JESSIE M. STEWART,
Notary Public in and for Dallas County, Texas.

ENDORSED: No. 2511, in Equity. The Texas & Pacific Railway Company, et al. vs. Mary Dunn, et al. Complainants' Answer to Defendants' Motion to Dissolve Injunction. Filed June 8, 1908. Louis C. Maynard, Clerk.

ORDER OVERRULING MOTION TO DISSOLVE.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Dallas, Vol. 10, page 469. Entered May 8, 1908.

Texas & Pacific Ry. Co., et al., Complainants,
vs.
Mary Dunn, et al., Defendants.
} No. 2511, in Equity.

This day came on to be heard the motion of the defendants to dissolve the temporary injunction heretofore issued in this

cause, and the Court having heard and considered said motion is of the opinion that same is not well taken; it is, therefore, ordered and adjudged that said motion be and is hereby overruled, to which action of the Court the said defendants then and there in open court excepted.

CLERK'S CERTIFICATE.

I, Louis C. Maynard, Clerk of the Circuit Court of the United States for the Northern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and correct copy and transcript of the record and of all proceedings in cause No. 2511, in Equity, now pending upon the docket of aforesaid Court, where Mary Dunn, et al., are plaintiffs, and The Texas & Pacific Railway Company, et al., are defendants, as fully as the same remain on file and of record in my office, at Dallas, Texas.

Witness my hand officially and the seal of said Court, at Dallas, Texas, this 26th day of December, A. D. 1908.

(Seal) LOUIS C. MAYNARD, Clerk.

By Geo. W. Mitchell, Deputy.

Office Supreme Court, U.S.
FILED.
JAN 11 1909
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 10, ORIGINAL.

IN THE MATTER

of

THE APPLICATION OF MARY DUNN, IN HER OWN BEHALF, AND AS NEXT FRIEND OF WALTER DUNN, GEORGE DUNN, JAMES DUNN, AND ANCEL DUNN, MINORS. AND AMANDA DUNN, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE EDWARD R. MEEK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

PETITIONERS' SUPPLEMENTAL BRIEF.

CARDEN, STARLNG & CARDEN,

Attorneys for Petitioners.

C. W. STARLING,

of Counsel for Petitioners.

E. DUNCAN & CO. PRINTERS DALLAS.

In the Supreme Court of the United States.

IN THE MATTER

of

The Application of Mary Dunn, in her own behalf, and as next friend of Walter Dunn, George Dunn, James Dunn, and Ancel Dunn, minors, and Amanda Dunn, for a writ of mandamus against the Honorable Edward R. Meek, District Judge of the Northern District of Texas, and against the Circuit Court of the United States for the Northern District of Texas.

SUPPLEMENTAL BRIEF OF PETITIONERS.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

In further support of their application for a writ herein, the petitioners supplement the second numbered subdivision of their original brief in support of their motion for leave to file their petition, as follows:

II.

Congress has no authority to confer original jurisdiction upon the Circuit Court of cases involving a controversy between citizens of the same State when the character of the

cause, as between such parties, is not one to which the judicial power of the United States extends, notwithstanding the fact that such case may also include, as between other parties, a controversy involving the construction and application of the laws of the United States. Neither has Congress intended to confer such jurisdiction, or jurisdiction thereof by removal from a State Court.

It is not doubted but that cases of this class may develop into "Cases arising under the Constitution and laws of the United States," and thereafter fall within the constitutional grant of judicial power. The questions for consideration are: (1) Whether prior to final judgment they are cases of this character, and if so, (2) whether Congress conferred original jurisdiction thereof upon the Circuit Court, and if so, (3) whether it has conferred jurisdiction by removal proceedings.

1. By the Constitution the people of the United States vested in the Federal Government judicial power extending to the class of cases mentioned in Paragraph 1, Section 2, Article 3, reserving unto the several States all judicial power not expressly or impliedly covered by such grant. This reservation includes controversies between citizens of the same State unless such controversies are one of the other classes mentioned in such paragraph. This grant of power to the Federal Government, and this reservation unto the States themselves ought, if possible, to be so construed that neither the grant, nor the reservation will be impaired, but on the contrary, so that full force and effect may be given to each of them, and so that the object of the grant may be attained. Hamilton and other early writers agree that the object of this grant of power as to

cases arising under the laws, was to make the judicial power of the Union co-extensive with its legislative power, and to make the Supreme Court final arbiter of all cases properly brought before it involving the construction or application of such laws. This object is attained, and effect is given to both grant and reservation, by giving to the words creating the constitutional grant no special meaning, but one which is consistent with former decisions of this court, and with their general use, and one which can be applied to any class of cases, and which is, in substance, that the judicial power extends to a case when it appears (1) to a certainty that its correct decision depends on the construction of the laws of the United States, or (2) when its correct decision necessarily depends on the construction of such laws, but that it does not extend unto a case until it appears that either one or the other of such conditions exists. There never has been any effort on the part of Congress to provide that the exercise of judicial power shall extend to cases of a particular character until it appears from the record that the federal question is certainly in the case. This fact, and the fact that no good reason can be suggested why the Constitution should extend judicial power to a case by reason of the character thereof before such character is definitely fixed, tend to convince one that the Constitution does not contemplate the grant or exercise of judicial power until the character of the case is fixed to a certainty. The second construction contended for does not modify the construction of the Constitution which was given to it by the court, speaking through Chief Justice Marshall, in Osborn vs. The Bank, it there being said that when a question to which the judicial power of the Union is extended

by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. The construction here contended for limits the construction in the Osborn case to cases where the federal question extends to, and forms a part of, controversies between each party plaintiff and each party defendant, and recognizes, as did Chief Justice Marshall, that in the latter class of cases the correct decision of the case certainly and necessarily depends on the construction of the laws of the United States. The construction here contended for reserves to the State the right to adjudicate controversies between citizens of the same State, until it appears that, as between them, there is a Federal question, and reserves to the Federal Government the right to exercise the judicial power vested in it, and in its Supreme Court, by means of a writ of error from such court to a State Court whenever it appears that a correct decision in the case, as to any party thereto, depends on the construction of the Constitution or laws of the United States.

If the cause of action under consideration were of such a character that a judgment could not be entered against any defendant unless against all of them, then it is possible the construction contended for would not affect the question presented. Neither could it effect it if the Federal question presented by the act incorporating the Texas & Pacific Railway Company could be urged by or against, or inure it to the benefit of the other party defendant.

It is settled that in actions ex-delicto where the defendants are sued jointly, if the proof warrants it, a recovery may

be had against a single defendant. A. & P. Ry. Co. vs. Laird, 164 U. S.399.

If the Circuit Courts have jurisdiction of suits of this character, and such jurisdiction once rightfully attaches, then it remains not only in the Circuit Court but in the Circuit Court of Appeals and the Supreme Court of the United States, until final disposition. Kirby vs. America Soda Fountain Company, 194 U. S. 141; Pacific Electric Company vs. Los Angeles, 194 U. S. 112.

This being true, if there is original jurisdiction, there may be a verdict and judgment in favor of the Federal corporation and against the other defendant or defendants, and jurisdiction yet remain, even if the judgment debtor be the only party perfecting an appeal. It is therefore submitted that the "case arising under the Constitution and laws of the United States" does not exist until one or the other of the parties complains of a judgment either in favor of or against the Federal corporation, because if the judgment is in favor of such corporation and against only the resident defendant or defendants, and there is no appeal as against the corporation, then no "case" is presented involving a Federal question, but such question has been eliminated and the case proceeds without it, governed solely by the ordinary rules or law.

Cases of this kind are not analagous to those where diverse citizenship of some, but not all, of the parties exists. In the latter class the right to exercise judicial power is fixed by the character of the parties, which is fixed to a certainty at the time it is disclosed, and no subsequent proceedings in

invitum can change such character. It always remains the same, no matter for or against whom judgment may be rendered. If judicial power, therefore, did not extend to such a case at the outset, there would never be a change in the character of such parties which would enable it to extend thereto. Where the character of the case fixes the extent of judicial power, and there is also involved a controversy between citizens of the same State not affected by such character, no such certainty exists at the outset of the case, neither is it necessary that it so exist. In the one instance, therefore, the Constitution has conferred upon Congress the authority to take from citizens of the same State a privilege of adjudicating their controversies in the State Court, and in the other instance it has not.

2. If Congress has the authority to confer original jurisdiction of cases of this class upon the Circuit Court, has it done so? It will be observed that the statutory grant of jurisdiction, so far as it affects cases of the class under consideration, is in the identical language of the constitutional grant of judicial power, except that the word "suits" is used in both the jurisdictional and removal sections of the statute, and the word "cases" in the Constitution. It therefore appears that the jurisdiction in original proceedings and by removal is co-extensive with the constitutional grant of judicial power, unless diminished by this substitution of the word "suit" for "case," or unless there is something in the present law or contained in, or excluded from, previous acts, indicating that it was not the intention of Congress to make a grant of jurisdiction as broad as possible. The only distinction between "suits" and "cases" which appears to have been made in

this court was by Mr. Justice Miller in the dissenting opinion in the case of N. O. & M. T. R. R. Co. vs. Miss. 102 U. S. 135, where he quoted several definitions of the word "suit" in support of the proposition that the term did not necessarily include the defense which may be interposed thereto. In response to the self-propounded inquiry as to what is meant by the suit arising under the law of Congress, he said: "The obvious answer seems to be that the cause of action is founded on the Act of Congress; that the remedy sought is one given by an Act of Congress; that the relief which is prayed is a relief dependent on an Act of Congress; that the right to be enforced in the suit is a right which rests upon an Act of Congress."

All the reasons hereinbefore advanced in support of the proposition that this is not a "case" arising under the laws of the United States are equally, if not more applicable in support of the proposition that this is not such a "suit." By the use of the word "suit" Congress also intended that, in accordance with the decisions of this court, there could be no original jurisdiction unless it appeared from the bill or declaration that the Circuit Court could take cognizance, and that consequently original jurisdiction was not to be determined by what might or might not afterwards develop in the case. In other words, original jurisdiction was not to be conferred simply because one of the parties might possibly be a party to an appellate proceeding from a judgment rendered in the case.

Disregarding this distinction, did Congress intend that the judicial power extending to this class of cases should be exercised by the Circuit Court in the first instance, or did it

intend that it should be thus exercised by the Supreme Court by a writ of error to a State Court, as provided by Section 709, Revised Statutes?

If Congress has the authority to confer original jurisdiction upon the Circuit Court in cases involving controversies between citizens of the same State before it appears that such controversy involves a Federal question affecting such parties, then to Congress there ought not be imputed an intention to confer such jurisdiction unless it is expressed in terms which indicate a desire to deprive the citizens of a State of the privilege of adjudicating their controversy in the State Court. On the contrary, in the absence of such expression it should be presumed that Congress intended that the judicial power of the Union should continue to be exercised in cases involving this class of controversies as it had been for nearly a century, by this court in the exercise of its appellate jurisdiction. In other words, it ought not to be assumed that Congress intended to deprive any State, or the citizens of any State, of any reserved right, in order to protect any other citizen in the exercise of its right, before it appears necessary so to do, unless such intent is expressed in clear and positive terms. Referring to Section 709, it appears that the Federal question under consideration is embraced in the following clause: "Or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute.....of the United States and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under the Constitution," etc. The language of this section evidences a painstaking effort on the part of Congress to leave to the

several States, unimpaired, the privilege of adjudicating controversies between citizens of the same State, until it became apparent that in a State Court of last resort some title, right, privilege or immunity arising under the Constitution or laws of the United States was asserted and denied. The Act of 1875 should be construed as prescribing no new form by which a party may submit to the judicial power a subject upon which such power is capable of acting where to exercise such power in any new way, especially by original jurisdiction, would deprive both the State and the interested citizens of the same State of the privilege of adjudicating a controversy not involving such question in the State Court, as contemplated by the Constitution and Section 709. This construction of the statute is also consistent with the recognized policy of Congress to diminish the class of cases in which there is a right to a writ of error from, or an appeal to, this court, and to contract rather than enlarge the jurisdiction of the Circuit Court.

Neither should there by any intent imputed to Congress to vest original jurisdiction of a case of this kind without some provision for a preliminary inquiry other than an inspection of the bill or declaration so as to determine whether a correct decision as to all parties necessarily depends on the construction of the laws of the United States, or whether the Federal question will certainly remain in the case. The decisions establish the proposition that under the Act of 1875 a declaration or bill, or the record upon removal, must show a substantial Federal question. It is not sufficient to claim that such question may arise in the progress of the case, neither is it permissible to remove the case after such question has arisen, yet Congress, if it can confer original jurisdic-

tion, can permit the parties to assert, and the Circuit Court to determine its jurisdiction in any way which it (Congress) deems proper, and it can permit a removal at any stage of the proceedings, but it has made no provision whereby the Circuit Court can determine its jurisdiction to a certainty. The class of cases under consideration, therefore, is identical with those cases in which a party claims that the Federal question may arise in the progress of the suit, or in which it does actually arise incidentally.

The grant of original jurisdiction in cases involving a Federal question which was conferred for the first time by the Act of 1875, is found in the same section as the grant of jurisdiction in suits in which there shall be a controversy between citizens of different States. The clauses conferring original jurisdiction by reason of diverse citizenship is in substantially the same language as the constitutional grant of power, to-wit: "Controversies between citizens of different States," the statute in literal terms being "of all suits, etc., in which there shall be a controversy between citizens of different States." The clauses relating to removal of either class of cases in the Acts of 1875 and 1887-8 are in the same language as in the corresponding clauses in the section conferring original jurisdiction.

It has in effect been held that Clause 2 of Section 1 is not as broad as the constitutional grant of power, in that if the controversy is not between citizens of different States exclusively, it does not fall within the grant.

Hooe vs. Jameson, 166 U. S. 395.

Penninsular Co. vs. Stone, 121 U. S. 635.

Peper vs. Fordyce, 119 U. S. 469.

Florida Central vs. Bell, 176 U. S. 321.

Thayer vs. Life Assn., 112 U. S. 717.

In the construction of the removal section of the same act, a contention that the language of the statute was as broad as the Constitution, was specifically denied. Blake vs. McKim, 103 U. S. 336. Congress, however, has authority to confer such jurisdiction based on diverse citizenship, as it has done in cases removed in which the Circuit Court, after removel, adjudicated controversies between citizens of the same State.

Barney vs. Latham, 103 U. S. 205.

Hyde vs. Ruble, 104 U. S. 407.

These decisions are, of course, based upon the effect of the language of previous acts, and upon the proposition that the Acts of 1875 and 1887-8 were intended to contract the jurisdiction of the Circuit Courts, but it is submitted that in carrying much of the constitutional language pertaining to each class of cases into the statute, Congress had in mind that the principles governing the construction of the diverse citizenship clause would, so far as possible, also govern the Federal question clause. In other words, it is here contended that Congress had in mind that the principle invoked in Strawbridge vs. Curtis, 7 U. S. 3d Cranch 267, would be applied in this class of cases to the extent of holding that each distinct interest should be represented by persons all of whom were in position to declare that they asserted some title, right, privilege or immunity under the Federal laws against all the other parties upon the opposite side of the case, and that it intended that the new grant of jurisdiction should be strictly construed by the application thereto of all

the principles invoked and changes wrought with a view of contracting the jurisdiction of the Circuit Court.

If it is urged that this construction deprives the Federal corporation of a substantial right, the answer is found in the remedy provided in Section 709. This corporation has no right to sue or be sued in the Federal Court unless such right is granted by Congress, and it can not be said that Congress in conferring this privilege upon it has done so to the unlimited extent of requiring citizens of the same State to surrender their constitutional privilege to sue and be sued in the courts of their own State.

It may be urged that the argument herein justifies the conclusion that the action is several as well as joint, and therefore removable as a separable controversy. An exhaustive and persuasive argument along this line for this purpose was made by Mr. Associate Justice Harlan in Pirie vs. Tvedt, 115 U. S. 41, but the majority of the court took the other view. That there is no separable controversy is also supported by the following authorities: Chicago, Rock Island & Gulf Ry. Co. v. Martin, 178 U. S. 245; A. G. & S. Ry. Co. vs. Thompson, 200 U. S. 203.

Attention is also invited to the fact that the removal statute makes no provision for removal on account of separable controversies in suits arising under the Constitution and laws of the United States. Of course, if there were several causes of action which could be alleged in distinct counts, the one which affected the Federal corporation alone could, on the authority of the Kansas City branch of the Pacific removal cases, be removed to the Federal Court, leaving the litigation as to the other parties in the State Court, but this right of

removal is not based on any feature of the separable controversy removal statute.

3. Inquiry is next made as to whether Congress, if it has conferred original jurisdiction, has granted the right of removal upon the application of a defendant affected by the Federal question and a resident defendant not substantially affected thereby. If the term "defendant or defendants," as found in the first and second clauses of Section 2, means that both must join therein; can it be said that Congress intended that where one of such defendants is not substantially affected by the Federal question and has no right to join on account of a claim of diverse citizenship, it has any right to control the forum by simply giving or withholding its assent to such removal? It is not reasonable to give this construction to the statute. It is, however, reasonable, and in line with the decisions governing removals arising on account of diverse citizenship to hold that the defendant must be qualified to assent to removal, and that if he is not qualified there can be no removal.

All the arguments which have been hereinbefore advanced in support of the proposition that there is no "case" arising under the Constitution and laws of the United States until it appears that the correct decision thereof necessarily depends upon the construction of such laws are also urged in support of the proposition that where there is one defendant who is affected by the Federal question presented in the declaration, and there is another who is not thus affected, then it does not appear upon the face of the declaration that there is a suit arising under the Constitution and laws of the United States. If it does not so appear, of course, the case is not removable

under the authority of Tennessee vs. Bank, 152 U. S. 454.

Petitioners' counsel feels that it is proper that there be a more complete explanation of his views which form the basis of the suggestion in the original brief filed herein to the effect that possibly the decision in the case of Chicago, Rock Island & Pacific Railway Company vs. Martin, rests solely upon the principle that in the application to remove under clause 2 there must be the capacity of a defendant to join in an application, instead of on the principle that there must be an actual joinder. This suggestion is based upon the idea that clause 3 provides for removal in cases embracing separable controversies when, and only when, the suit involves parties upon opposite sides who are citizens of the same State, and in addition thereto involves parties who are citizens of different States, as to whom a separable controversy exists. Counsel's view is that under the second clause "all suits between a citizen of the State where the suit was brought and the citizen of another State," (the original statutory language as construed in Strawbridge vs. Curtis, 7 U. S. 3d Cranch 267, and according to Smith vs. Lyon 133 U. S. 315, practically preserved by subsequent Acts) whether involving separable or inseparable controversies, were capable of being removed; that clause 3 is a saving clause of much the same tenor, and for much the same purposes as the separable controversy clauses under previous Acts, yet a distinct jurisdictional clause. His view is that one of the substantial features of the Act of July 27th, 1866, Chapter 288, which was preserved and carried into the Act of 1875, was the right to assert a removal when there was a separable controversy, and when the case was not otherwise removable because of the presence therein

of resident citizens; that this feature was again carried into the present law, these views not being out of harmony with those of this court as expressed by Mr. Justice Harlan in Barney vs. Latham, 103 U. S. 205. These views of necessity led to the conclusion that the right of a defendant under clause 3 can not be greater than under clause 2, and that, therefore, the words "defendant or defendants" as used in clause 2 should be construed as having the same meaning as "either one or more of the defendants" in clause 3, thus bringing about the further conclusion that under clause 2 the cause could be removed by any one of the defendants, provided all were entitled to remove. An examination of the cases usually cited as authority prior to the Martin case, in support of the language that all of the defendants must join when seeking a removal under clause 2, discloses the following conditions, which indicate that the question as to whether the defendants must actually join had not been considered by this court prior to the decision in the Martin case.

In Hanrick vs. Hanrick, 153 U. S. 198, the defendant Brady was a citizen of the same State as some of the plaintiffs.

In Torrence vs. Shedd, 144 U. S. 527, it was alleged that Sorrin, an intervenor in a partition suit, was a citizen of Indiana, and all other defendants citizens of Illinois, the State in which the suit was brought presumably by a citizen of Illinois, and where the land was situated.

In City of Bellaire vs. B. & O. Ry. Co., 146 U. S. 117, the plaintiff city and the defendant Central Railway Company of Ohio were citizens of Ohio.

In Wilson vs. Oswego Township, 151 U. S. 61, a petition for removal showed that plaintiff, the Union Savings Association (whom the court found to be an indispensable, not a formal party,) were each citizens of Missouri.

In Merchants Cotton Press & S. Co. vs. Insurance Company of North America, 151 U. S. 368, the court found that after arranging the parties according to the matters in dispute there were three New York corporations occupying positions of defendants, while there was one New York corporation occupying the position of plaintiff.

Fletcher vs. Hamlet, 116 U. S. 408, was a joint suit which was removable at the instance of the defendants, who were partners. Service was had upon one of the partners, the effect of which was to bind him and the partnership property in the State. This partner appeared and answered for himself and the firm. Later another partner was served, and these two joined in an application to remove. The court said: "It is conceded that the suit was not removable when the petition for removal was filed, unless the service of process on Fletcher on the 4th of June so changed the character of the litigation as to make substantially a new suit begun on that day. In our opinion such was not the effect of the new process. The suit was begun when process was served on Wessenberg and the firm."

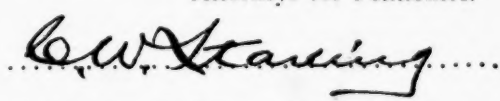
On the other hand there are plenty other authorities that all must be qualified to join. Moreover, in the Martin case it appeared that one defendant claimed a right of removal under clause 1, and the other'r right, if it existed, was under clause 2, and as there was no provision for removals unless both had the right under some one clause, the conclusion was

reached that the court had in mind the rule that all defendants, in order to join, must be competent to perfect an application under one or the other of the clauses, and that as clause 1 was that under which the removal was sought, and as both defendants could not qualify under this clause, there was and could be no joinder.

If the Martin case did not establish this doctrine that both defendants must be qualified, then it is submitted that as a case of first impression in this court, it should be held in the case at bar that Congress did not intent that there should be a removal unless all defendants were in a position to say that they were substantially affected by the Federal question.

CARDEN, STARLING & CARDEN,

Attorneys for Petitioners.



Attorney and of Counsel for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORIGINAL.

No. 10.

IN THE MATTER

OF

The Application of MARY DUNN in her own behalf, and as next friend of WALTER DUNN, GEORGE DUNN, JAMES DUNN, ANCEL DUNN, minors, and AMANDA DUNN, for a Writ of Mandamus against HONORABLE EDWARD R. MEEK, District Judge of the United States for the Northern District of Texas, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF IN OPPOSITION TO THE APPLICATION FOR ISSUE OF WRIT OF MANDAMUS.

JOHN F. DILLON,
RUSH TAGGART,
W. L. HALL,
Attorneys for Respondent.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States.

IN THE MATTER

OF

The Application of MARY DUNN in her own behalf, and as next friend of WALTER DUNN, GEORGE DUNN, JAMES DUNN, ANCEL DUNN, minors, and AMANDA DUNN, for a Writ of Mandamus against HONORABLE EDWARD R. MEEK, District Judge of the United States for the Northern District of Texas, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Brief in Opposition to the Application for Issue of Writ of Mandamus.

The application for this writ and the return of the same to the writ, presents the following facts:

Mary Dunn, the relator, filed a petition in the District Court of Dallas County, Texas, and made as parties thereto, the Texas and Pacific Railway Company, C. W. Slayter and Carl Rasmussen.

The allegations of the petition were that the plaintiffs resided in Dallas County, Texas, and that the defendant the Texas and Pacific Railway Company is a

corporation, duly incorporated, with an office and a local agent in Dallas County, Texas. That the defendant Slayter is a resident of the State of Texas likewise, and a resident, citizen and inhabitant of Harrison County, and that the defendant Rasmussen was also a resident, citizen and inhabitant of Harrison County, and that each of the defendants are to be found in Dallas County.

The action was for the death of J. J. Dunn, husband of the plaintiff, and the father of the children on whose behalf the action was brought, and it was alleged that the said J. J. Dunn had been killed within the city of Dallas, by an engine on the tracks of the Texas and Pacific Railway Company, through the negligence of the defendants, in various particulars named in the petition.

After the suit was brought, the three defendants filed their petition and bond for the removal of this cause to the United States Circuit Court, alleging that the Texas and Pacific Railway Company was a corporation duly organized and existing under and by virtue of the laws of the United States, and that the action was a civil suit, arising under the laws of the United States, of which the Circuit Court of the Northern District of Texas was given original jurisdiction by Act of Congress approved March 3d, 1887, and the Act of Congress approved August 13th, 1888, for the correction and enrollment of the first entitled Act.

Objections were interposed in the State Court to the removal from the State Court, and the State Court entered an order denying the removal. Notwithstanding this, the record was duly filed in the office of the Clerk of the Circuit Court for the Northern District of Texas, at Dallas, and the plaintiff, through attorneys, filed a motion to remand this cause.

The grounds upon which they sought the remand may be succinctly stated, that the defendants Slayter and Rasmussen were inhabitants of Harrison County, Texas, which County is in the Eastern District of Texas, that there was no separable controversy as to

the Texas and Pacific Railway Company, nor as to the defendants Slayter and Rasmussen, and that it did not appear upon the face of the record that plaintiff's petition alleges any cause of action under the Constitution and laws of the United States, and that the defendant, the Texas and Pacific Railway Company has its principal office or place of business in the City of New York, in the Southern District of New York, State of New York, and that it is not an inhabitant of the Northern District of Texas.

This motion to remand was denied upon the hearing, by the respondent, Honorable EDWARD R. MEEK, District Judge, sitting as Circuit Judge. Thereupon this writ of mandamus was sued out, to cause the remanding of the said suit from the Circuit Court for the Northern District of Texas, to the State Court where it was originally brought.

ARGUMENT.

I.

The removal of this cause to the Federal Court was in exact accordance with the provisions of the Act of March 3rd, 1887, as corrected by the Act of August 13th, 1888.

The first section of this Act defines the jurisdiction of the Circuit Court as depending on subject matter, citizenship and amount in controversy, as follows:

That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of

$2,000, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy, the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable by them.

It will be observed that jurisdiction is given by this comprehensive definition to the Circuit Court in two separate and distinct classes of cases. One where the suit is one arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners. In this class of cases the subject matter of the suit determines the jurisdiction of the Court, regardless of the citizenship or residence of the parties to it.

The other class is where the citizenship of the parties is as defined in the Act, and regardless of the character of the subject matter of the suit, there, equally the Circuit Courts of the United States have the original jurisdiction granted by this definition.

The remaining portions of this section not quoted, regulate the exercise the jurisdiction of the Circuit Courts for the benefit of the persons brought before it, whose suits are to be adjudicated. The grant of jurisdiction with respect to the subject matter of the suit is in almost the exact language of section two of Article III. of the Constitution of the United States :

" The judicial power shall extend to all cases in law and Equity, arising under this Constitution, the Laws

f the United States and Treaties made, or which shall e made under their authority ;—to all Cases affecting mbassadors, other public ministers and consuls ;—to ll cases of admiralty and maritime jurisdiction ;—to ontroversies to which the United States shall be a arty ;—to controversies between two or more States ; -between a state and citizens of another state ;—be- ween citizens of different states ;—between citizens of he same state claiming Lands under grants of different tates and between a State or the Citizens thereof and oreign States, Citizens or Subjects."

The foregoing language conferring jurisdiction by eason of the subject matter has been uniformly con- rued as applied to corporations created by Acts of ongress (except in the case of national banks), to ver suits against them as " arising under the laws of he United States " ; that is to say, the jurisdiction f the Circuit Courts is complete over such suits, here the requisite amount is involved, with- ut reference to citizenship, because of the " sub- ect matter" of the litigation. (Texas and Pacific ailway Company vs. Cox, 145 U. S., 593; Pacific ailroad Removal Cases, 115 U. S., 1 ; Oregon Short ine, etc., Railroad vs. Skottowe, 162 U. S., 490; exas & Pacific Railway Company vs. Cody, 166 U. S., 06 ; Texas and Pacific Railway Company vs. Barrett, 66 U. S., 617).

The foregoing decisions under the Acts of 1875 and 887 had been anticipated by Mr. Justice MILLER of his Court in some decisions upon Circuit relating to he Union Pacific Charter, created under the Act of ongress of July 1st, 1862 (12 Stat., 489). Section I. f that Act construed by him is identical in language ith section I. in that particular of the act incor- orating the Texas and Pacific Railway, approved arch 3d, 1871 (16 Stats., 573).

In the case of Smith against the Union Pacific Rail- ay, reported in 2 Dillon, 278, a citizen of Iowa sued he Union Pacific Railroad Company in the United tates Circuit Court for the Eastern District of Ne- raska. Defendant demurred to the complaint on

the ground that the court had no jurisdiction of the person of the defendant or of the subject matter of the action, and the matter is very clearly disposed of by the learned Justice, as follows :

" Mr. Justice MILLER. The Act of Congress creating the defendant corporation contains this provision (12 Stats. at large, 490) : ' The Union Pacific Railroad Company,' by ' that name shall have perpetual succession and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have, a common seal, etc." (Section I.)

" I have examined the previous decisions of the Supreme Court of the United States, supposed to have an important bearing on the question now presented, and after reflection am still of opinion that Congress intended to make the defendant capable of suing and being sued in the federal courts, which have jurisdiction of the same class of actions between other parties."

In a note to the report the previous decisions of the Supreme Court referred to are stated to be : Bank of United States vs. Deveaux, 5 Cranch, U. S., 61, 1809 ; Bank of United States vs. Martin, 5 Pet., 479 ; Osborne vs. Bank of U. S., 9 Wheat., 738, 1824. This decision was rendered at the May Term, 1872.

In 1875, the case of Curtin vs. Union Pacific Railroad came before the same Justice in the same District. Curtin, a citizen of Nebraska, sued the Union Pacific Railroad Company in the State Court, and the defendant filed its petition in the state court for the removal of the cause upon the ground that it was a corporation created and organized under and by virtue of a law of the United States, approved July 1st, 1862, and that it had a defense in said action, arising under the law of the United States. It was ordered to be removed by said court and in the United States Circuit Court, plaintiff filed a plea to the jurisdiction of the Court, which plea was submitted on an agreed statement of facts which admitted that no defense was to be made under any other law of the United States than the charter of the defendant.

Concerning this, the following opinion was rendered by MILLER, Circuit Justice:

"I am of opinion that the cause was properly removed into this court under the Act of Congress relating to the removal of suits against federal corporations, and that it may be fully tried here upon its merits."

Plea to the jurisdiction overruled (3 Dillon, Circuit Court, Rep., 366).

At the same term the case of Bauman against the Union Pacific Railway came before the United States Circuit Court for the District of Nebraska, in which Bauman, a citizen of Nebraska, sued the Union Pacific Railway in that Court, and motion was made by the defendant to dismiss for want of jurisdiction. And the following memorandum was rendered by MILLER, Circuit Justice:

"The petition alleges that the plaintiff is a citizen of the State of Nebraska and that the defendant is a corporation created by and existing under the laws of the United States; and the question is whether it is suable in this court by a citizen of the State of Nebraska. Under the charter of the defendant Company I have heretofore held that it was suable in this court by a citizen of another state (Smith v. Union Pacific Co., 2 Dillon, C. C. R., 378), and I am of opinion, on consideration of the provisions of the Charter, that it may sue and be sued in this district without reference to the citizenship of the adverse party (3 Dillon, C. C. R., 367)."

It will be observed that these decisions were rendered prior to the passage of the Act of March 3d, 1875, and under the provisions of section 640 of the Revised Statutes of the United States.

By Section II. of the Act of March 3d, 1887, as corrected by the Act of August 13th, 1888, the broad power is given by the first sentence of the Section:

"That any suit of a civil nature at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under

their authority, of which the circuit courts of the United States are given original jurisdiction, by the preceding section, which may now be pending, or which may hereafter be brought, in any state court may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district."

The question we have here presented, therefore, is whether the fact that the Texas and Pacific Railway Company is joined with its employes, the engineer and fireman managing the engine upon its train, destroyed the right of the plaintiff to bring her suit in the United States Circuit Court for the Northern District of Texas under the first section of this judiciary act and consequently, under this second section of the judiciary act, prevented the defendants from removal of the case when brought in the State Court. If the Texas and Pacific Railway Company had been sued alone, there could be no question in this case of the right of it alone, to remove the case, because it is a federal corporation. The concrete question in this case is whether by the fact that Slayter and Rasmussen, citizens of Texas, were joined as defendants, the action ceases to be a civil suit arising under the laws of the United States. Under the authorities cited *ante*, it is conclusively settled that if the Texas and Pacific Railway Company were sued alone in the State Court, the action would be one arising under the laws of the United States. Does it cease to be such an action because other parties are jointly sued with it? Will it not be necessary, to examine into, construe and apply the provisions of the Act of Congress incorporating the Texas and Pacific Railway Company, when its engineer and fireman have been united with it upon an alleged joint liability in negligently managing the engine of that corporation to the same extent as would be necessary if it were sued alone for injuries negligently caused by the engine? This is the fundamental question

that was involved in the application for the removal of the Dunn Case by the Texas and Pacific Railway Company, which was passed upon by the court below, and which is now presented to this court. So far as we know, this court has not passed upon this precise question, arising upon the Acts of Congress relating to the jurisdiction of the Circuit Courts, and controlling the right to remove causes to those courts from the State Courts.

Where the question has been presented in the Circuit Courts of the United States under facts similar to those presented in this case, the ruling has uniformly been as contended for by the respondent.

In the case of Fisk against The Union Pacific Railroad Company and others, 8 Blatchford, 243, the question was presented to Circuit Justice NELSON and Judge BLATCHFORD, upon the following facts:

Fisk brought a suit in the Supreme Court of the State of New York against the Union Pacific Railroad Company, Credit Mobilier of America, a corporation of Pennsylvania, and twenty-two other persons. This was filed in the early part of July, 1868. On the 3d of August, following, The Union Pacific Railroad Company and five of the individual defendants, presented their petition to the State Court to remove the case to the Circuit Court of the United States for the Southern District of New York, under an Act of Congress passed July 27th, 1868 (15 U. S. Stat. at Large, 226). This act provided that any corporation or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced, in any court other than a Circuit or District Court of the United States, for any liability or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the Court in which it may be pending to the proper Circuit or District Court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a

defense arising under or by virture of the Constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such Court on the first day of its session, copies of all process, pleadings, &c., and doing such other and appropriate as are required to be done by an Act of Congress, passed July 27th, 1866; and that it shall be thereupon the duty of the Court to accept the surety and proceed no further in suit. Upon the filing in the Circuit Court of the United States, for the Southern District of New York, of the record in conformity with the Act governing removals at that time, motion was made by the plaintiff to remand the case to the State Court, and the motion was heard before Associate Justice NELSON and Judge BLATCHFORD. Justice NELSON rendered the opinion upon the motion to remand and said:

"I agree with the views of the counsel for the defendants that the fact that questions may arise, in the course of the litigation, besides those under the Act of Congress and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the Federal Courts. This principle was settled in Osborn v. Bank of the United States (9 Wheaton, 738), and has been recognized as the settled law of the Court ever since. Nothing can be added to the conclusiveness of the reasoning of Chief Justice MARSHALL upon the point, in that case. He observes: 'If this were sufficient to withdraw a case from the jurisdiction of the Federal Courts, almost every case, although involving the construction of a law, would be withdrawn, and a clause in this Constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the Constitution, laws or treaties of the United States.'"

For the same reasons, I am of opinion, that the joining of defendants in a suit, not within the limitation, as prescribed by the Act, with those who are, cannot be permitted to withdraw the cause from the jurisdiction of the Federal Court. If this were admitted, the privilege extended to the parties setting up a right under the Constitution and laws of the United

States, would, in most, if not in every instance, be defeated. Indeed, if any such principle could be admitted, most of these Acts of removal, depending principally upon the subject matter, and intended to secure the interpretation of the Constitution and laws of the United States at the original hearing, to its own judiciary, would be futile and worthless.

The Act of 1833, which provides for the removal of suits against an officer of the United States, or other person, for acts done under the revenue laws, could be readily evaded, by joining one or more persons with him not acting in that capacity. If these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate and incidental to the principal litigation in respect to which the Act of Congress has interposed the remedy of removal. In this way, the right of the parties to have their defense under the Constitution or laws of the United States, tried in the Federal Courts, is secured, and, at the same time, the remedy of the plaintiff is unimpaired."

In Landers against Felton, *et al.*, in the Circuit Court of the District of Kentucky, suit was brought against S. M. Felton, receiver of the Cinn., N. O. & Tex. & Pac. Railway, appointed by the Circuit Court of the United States for the District of Kentucky, and the Cinn., N. O. & Tex. & Pac. Ry. Co., alleging a joint liability for negligently injuring the plaintiff. Petitions for removal were filed, one by Felton and the Cinn., N. O. & Tex. & Pac. Ry. Co., and the second by Felton, alone ; and this second petition was upon the grounds that the suit arose under the constitution and laws of the United States. A motion to remand was filed in the Circuit Court, and came on for hearing before TAFT, Circuit Judge, who denied the motion to remand, and thus passed upon the question thus presented in the case at bar.

" The question here arises whether an action brought against the receiver of a United States Court and others, who are citizens of the same state as that of the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and constitution of the United States. I do not see how it can be

otherwise. No separate liability could be asserted against the receiver, as receiver, except under the laws of the United States. If no separate liability could be asserted against him, except by virtue of those laws, certainly no joint liability with another could be asserted against him, except by virtue of the same laws. Therefore, the joint liability of the defendants, with the receiver, arises under the laws and constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint *tort feasors* is also several. He might, therefore, have maintained his action against the resident defendant in a state court, without any possibility of removal to a federal court. He elected, however, to join the resident defendant with a person against whom he could establish no liability, in the capacity in which he sues him, except by use of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the federal statutes. Hence the cause of action is removable" (73 Fed. Rep., 311).

In the case of Lund vs. Chicago, Rock Island & Pacific Railroad *et al.*, a suit was begun in the District Court of Douglas County, Nebraska for personal injuries alleged to have been sustained through negligence of the Chicago, Rock Island & Pacific Railway and the Union Pacific Railway Co. The allegations of the petition were that the defendants were in joint possession and jointly operating a line of railway reaching from Council Bluffs, Iowa, to South Omaha, Nebraska. There were also joined as parties, S. H. H. Clarke, E. A. Anderson, John W. Doane and Frederic R. Coudert, as receivers of the Union Pacific Railway Company. The Union Pacific and the receivers filed their petition and bond for the removal of the cause to the federal court and a motion to remand was made, and came on for hearing before McHugh, District Judge, who denied the motion, giving the following reasons therefor:

"The Union Pacific Railroad is a corporation deriving its corporate powers from Acts of Congress. It has been decided that since every suit against this fed-

eral corporation necessarily involved the exercise of the corporate power it received in a federal law, therefore all suits against the Company were suits arising under the laws of the United States; and hence that the suits against the corporation could be removed to federal courts (Pacific Railway Removal Cases, 115 U. S., 1)." "The receivers of the Union Pacific Railway Company were appointed by this Court. All the powers of the receivers in possession, control and operation of this road and properties were derived from this Court. The Court acted by virtue of the judicial power possessed and exercised under the constitution and laws of the United States. Therefore, all the power possessed and exercised by these receivers in respect to this railroad property, was by virtue of federal law. Every suit against these receivers therefore, as it necessarily involves the exercise of these powers, is a suit arising under the laws of the United States and is removable to the Federal Court. Railroad Co. vs. Cox, 145 U. S., 593."

Moreover, the right to maintain this action against the receivers grows out of a federal law. A receiver having been appointed by the court, that court had exclusive jurisdiction over him, and no suit at law could be prosecuted against him without leave of the court. But our federal statute permits such suits to be brought against these receivers without leave of court. Hence this suit was begun and is being maintained against these receivers by virtue of a federal statute. It is plain from these considerations that this suit, as it affects the Union Pacific Railway Company and the receivers, is an action arising under the laws of the United States.

"It is urged, however, that conceding the correctness of what has been said, this cause is not removable, because the defendant, the Chicago, Rock Island & Pacific Railway Company, Consolidated, is a Nebraska corporation; that as to it, no federal law is involved; that, since this last-named company, could not, if sued alone, remove the cause to this court, this cause being against all the defendants jointly, cannot be so removed. I do not think this position well taken. The fact that the action is against the defendants, jointly, under the circumstances of this case, makes it removable. In this suit it is sought to hold the defendants jointly liable. We have already seen that all suits against the Union Pacific Railway Company and the receivers are suits which of necessity, arise

under federal law. No suit can be brought against them which does not involve the power under which they act, which is, as we have seen, the laws of the United States. So every action against them jointly with another must be a suit arising under federal law. No joint recovery can be had, no joint suit can be prosecuted, which does not reach all the defendants. To reach the Union Pacific Railway Company and the receivers in this case it is necessary to involve the laws whence they derive their power. Since this suit against the receivers and the Union Pacific Railway Company necessarily involves the federal law, it is clear that this case arises under federal law. A suit against the Rock Island Company could be maintained without reference to the federal laws. But when it is sought to hold jointly with this company the Union Pacific Company and its receivers, then a new character is given the action, a new element is introduced, to wit, the laws of the United States. Therefore, as it is necessary, in order to maintain this action against the defendants jointly, to invoke the federal law, the case is one arising under the laws of the United States, and hence was removable under the statute" (78 Fed. Rep., p. 385).

In Martin vs. St. L. S. W. Ry. of Texas *et al.*, 134 Fed. Rep., 134, the question was presented, where a passenger sued a corporation of Texas and the Texas and Pacific Railway Company in the State Court, and the two corporations petitioned for removal of the case as one arising under the laws of the United States, and motion was made to remand the case, because no separable controversy was presented between the plaintiff and the defendants, and because the cause did not involve or present any controversy arising under the laws of the United States, at least, so far as the one defendant was concerned. The cause was heard by MAXEY, District Judge, who says:

"In the present case both defendants have joined in the petition to remove. But it is objected by counsel for the plaintiff that the federal question affects only the Texas & Pacific Railway Company, and hence, notwithstanding the two defendants have united in the

petition, the cause is not removable. The answer to the objection will be found in the fact that the cause of action as declared on by the plaintiff is joint, the purpose of the suit being, as before stated, to establish a joint liability against both defendants. Any suit, whatever its nature, brought against the Texas & Pacific Railway Company alone, would be one arising under the laws of the United States, and the same result would follow where the object of the suit was to establish a joint liability against that Company, and other parties defendant. In such case the federal question necessarily affects both parties and permeates the entire suit entitling it to be removed where all the parties unite in the petition."

In the concluding portions of Judge MAXEY's opinion in this case, he refers to a decision to the contrary by the court of Civil Appeals in Texas and Pacific Railway Company against Huber, 75 S. W., 547, but declined to follow the reasoning of the State Court in that case. This case was further considered by the Supreme Court of Texas and it appears upon the brief of the relator, together with a case of Easton and Knox against the Texas and Pacific Railway Company. An examination of the opinion in those cases indicates that they are largely based upon the decision of this court in C. & R. I. R. R. Co. vs. Martin, 178 U. S., 245, in which the suit was brought against the Chicago, Rock Island Railroad Company and the receivers of the Union Pacific Railroad Company in the District Court of Clay County, Kansas, and where the receivers presented their separate petition and bond for the removal of the case to the federal court for the district.

This application was overruled by the State Court, and the case then taken to the Supreme Court of Kansas, which affirmed the lower court, and then came to this court, and the decision in this court affirmed the Supreme Court of Kansas, upon the ground that there was no separable controversy, and that but one defendant petitioned for the removal. In other words, construing the first sentence of section

two of the Act of Congress of March 3d, 1887, as requiring all the defendants to join in the petition for removal. This is all that was decided by that case, and does not seem to us to have any bearing on the precise question that is involved in the case at bar. Upon principle and upon authority therefore, it is submitted that the case at bar was rightfully removed to the United States CircuitCourt of the Northern District of Texas.

II.

The contention of the brief of the relator that the suit could not originally have been maintained against the Texas and Pacific Railway in the Northern District of Texas and against Slayter and Rasmussen is not well founded.

The contention under paragraphs three and four of the relator's brief loses sight of fundamental definitions and of legislation applying to the defendants which are important to be noticed. The Texas and Pacific Railway Company was incorporated by an act approved March 3d, 1871 (16th Stats., 573). Its name was changed by a subsequent act approved May 2d, 1872 (17 Stats., 59). By section one of the original Act, which has not in any way been amended, the persons named

"are hereby created a body politic and corporate in fact and in law by the name and style and title of the Texas and Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, within all courts

of law and equity within the United States and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, elect, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, County of Harrison, State of Texas; etc."

By section II. of the act, after providing for the opening of books of subscription for capital stock and as to the number of directors and method of choosing the same, the provision is:

"The directors shall hold their offices for any term not exceeding three years, as may be provided in the by-laws, and the annual meeting of the stockholders shall take place as may be provided for in said by-laws."

By section 10 of the Act of Congress entitled "An Act to divide the State of Texas into four Judicial Districts," approved March 11th, 1902 (32 Stats. at large, 68), it is provided:

"That all process issued against defendants residing in any county which may hereafter be created by law shall be returned to the nearest place for holding court in the judicial district within which said county is formed. That if there be more than one defendant and they reside in different divisions of the district or in different districts, the plaintiff may sue in either division or in either district in which one or more defendants may reside, and send duplicate writ or writs to the other defendant or defendants, on which the Clerk issuing the writ shall endorse that the writ thus sent is a copy of a writ sued out of the court of the proper division of said district, and said writs when executed and returned into the office in which they were issued, shall constitute one suit and be proceeded in accordingly: Provided, that suits and actions affecting the title to or to foreclose liens on real estate shall be brought in the district and in the division thereof in which said real estate is, in whole or in part, situate."

The following provisions as to service of process are found in the Civil Statutes of Texas:

"ART. 1222. In suits against any incorporated company or joint stock association, the citation may be served on the president, secretary or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought, or by leaving a copy of the same at the office of the company during office hours; and in suits against receivers of railroad companies service may be had upon the receivers or upon the general or division superintendent, or upon any agent of the receiver who resides in the county in which the suit is brought.

"ART. 1223. In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State of such corporation, joint stock company or association, or acting corporation or association."

The allegations of the petition are that the defendant railway corporation was operating a railway in and through Dallas County, Texas, and that it had an office and a local agent in Dallas County, Texas. Under Section 914 of the Revised Statutes of the United States, the mode of service of mesne process on corporations and other persons is according to the State law, where the State law has made any provision, Congress not having laid down any rule upon the subject (Amy vs. Watertown, 130 U. S., 301–304).

The contention of the relator's brief, in the light of these express provisions of the statute, is, it is respectfully submitted, entirely unfounded. First: Under the first section of the Texas & Pacific Railway Company's Charter, the right to sue and the obligation to submit to suit in any court of law or equity within the United States is expressly provided for therein, and the charter was accepted by it, subject to that obligation. The right to sue

it in the United States Circuit Court in the Northern District of Texas would not be dependent upon its consent, but upon the fact whether it was doing business within that district, and had an agent there upon whom service could properly be made. If such conditions existed, then it could be properly served with process, and when so served the Circuit Court would have jurisdiction over it under section one of its charter, and the principle of the following cases:

Lafayette Ins. Co. vs. French, 18 How., 404.
St. Clair vs. Cox, 106 U. S., 98.
Fitzgerald Co. vs. Fitzgerald, 137 U. S., 98.
Mexican Central Ry. Co. vs. Pinkney, 149 U. S., 194.
In re Hohorst, 150 U. S., 653.

The fact that the individual defendants, Slayter and Rasmussen, were residents of the Eastern District of Texas, under section 10 of the Act of Congress of 1902 (quoted *ante*) would not interfere with getting service upon them, because the clauses of section 1, of the Act of March 3d, 1887, regulative of the exercise of the jurisdiction of the Circuit Court, and limiting the right to suit in the federal courts to the district in which the defendant is an inhabitant, would not have application to these persons in that case, for the reason that special provision is made in the subsequent Act of 1902 for Service of Writs in the different districts into which the State of Texas is divided. If the plaintiff saw fit to sue the Texas and Pacific Railway Company, in the Northern District where service could be had upon it, and join with that company, Slayter and Rasmussen, the Clerk of that court would have the right to issue writs for the other defendants to the other districts, and thus, that feature of the objection to the original jurisdiction of this case in this Northern District of Texas is entirely eliminated.

It is suggested in paragraph 5 of the petitioner's brief that the construction should be given to section 10 of

the Act of March 11th, 1902 (quoted *ante*), as applying solely to a local action of the class described in section 8 of the Act of 1875.

The history of the legislation of Congress upon this subject would seem to be against any such construction, apart from the real difficulty of giving such an interpretation to the language in the act itself.

Section 740 of the Revised Statutes contains precisely the same provisions as section 10, save and except that it affirmatively provides that it applies to suits not of a local nature. Congress recognized in the enactment of this section of the Revised Statutes, the propriety—where a state was divided into separate districts, and there was a joint suit against defendants residing in different districts—of a provision that the writs might run to either district, and the suit be brought in any of the districts in which one or more of the defendants might reside, precisely as section 10 of the Act of 1902 has provided.

When the Acts of 1887 and 1888 came to be passed, no reference was made by them to the exceptional cases that had theretofore been provided for by section 740, and the doubt was therefore expressed (Greeley against Lowe, 151 U. S., 72) as to whether section 740 had not been repealed by the subsequent enactments. But whatever doubt there was upon that subject has been dissipated as to Texas, by the enactment, subsequent to the Acts of 1887–8, of the Act of March 11th, 1902 (cited *ante*). If, therefore, section 740 has been repealed, in the opinion of this court by the Acts of 1887 and 1888, Congress has subsequently made special provision with respect to Texas, modifying that part of the Act of 1887 which limits the right to bring a civil suit to the district of which the defendant is an inhabitant, by providing that, where there are two or more defendants, and suit is brought in any district in the state in which one defendant resides, the writ may run to the other districts for the other defendants. The language of section 10 of the Act of 1902 also clearly indicates that it was not

intended to be limited in its application to the class of local actions mentioned in the 8th Section of the Act of 1875, for it has the proviso:

"Provided that suits and actions affecting the title to or to foreclose liens on real estate shall be brought in the district and in the division thereof in which said real estate is in whole or in part situate."

indicating that these are only a part of the civil suits to which this section is applicable. In addition thereto, the provisions of this section 10, are wholly superfluous, if they apply only to the classes of actions mentioned in section 8 of the Act of 1875. Section 8 fully provides in all actions which come within its provisions for substituted service for any defendants who are not inhabitants of the district in which the suit is brought, and inasmuch as all suits described in section 8, are suits which affect property within the district, such service is in every respect sufficient for all purposes of any such litigation although only a judgment in *rem* can be rendered in the absence of a personal appearance of the defendant, or defendants from the other district. But section 10 of the Act of 1902 covers all process against defendants, and provides for a personal service, thereby authorizing judgments *in personam* and, whether the defendant or the defendants personally appear or not, after the service provided for in the section, a kind of judgment not provided for in section 8 of the Act of 1875, and giving to the court in which the suit is pending, complete jurisdiction over the person served for all purposes of the litigation.

II.

In the sixth sub-division of the petitioner's brief, the correctness of a series of decisions of this Court respecting the jurisdiction of Federal Courts over controversies arising under the Constitution and Laws of the United States covering nearly a century of time is challenged, and this Court is asked to reverse the same.

By the third article of the Constitution of the United States, judicial power is declared to extend

"to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority."

By the first section of the Act of 1887, the jurisdiction of the Circuit Courts is made co-extensive with this grant of judicial power, and in almost identically the language of the constitution, and by the first clause of section 2 of the Act, the right of removal to the Circuit Courts of the United States in all cases thus defined in the first section of the act, is given to the defendant or defendants in such action. In the case of Osborne vs. U. S. Bank (9 Wheaton, 738), Chief Justice MARSHALL considered the scope of this grant of judicial power in the Constitution, and whether or not a bank chartered by Act of Congress with the right

"to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended in all state courts having competent jurisdiction, and in any Circuit Court of the United States,"

was thereby entitled to bring its suit against Osborne in the Circuit Court of the United States, as being a case arising under a law of the United States, within the meaning of the grant of judicial power in the Con-

stitution, by reason of the subject matter of the cause. In the decision in that case he sustained the right of the bank to thus bring its suit, by reason of the fact that every action of the bank necessarily grew out of the Act of Congress creating it, and its power was to be tested by that Act, and by reason of that fact every case in which the bank was a party was a case that necessarily grew out of, and arose under a law of the United States. The decision thus made in 1824 has been the law of the United States, without exception from that day to this, and has been applied in very many cases in this court, and upon varying states of fact, only a few of which have been cited in this brief.

The proposition argued in the sixth paragraph of the petitioner's brief, asks this court to declare that as to the Texas and Pacific Railway Company, chartered under the Act of Congress of March 3d, 1871, and like the United States Bank, whose charter was under consideration in the Osborn vs. Bank case, was expressly authorized

"to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States,"

this principle shall no longer be the law, but that it shall be declared that a suit against that Company involving its actions in the operations of the Railway which it is maintaining and operating under the express provisions of its charter, and therefore necessarily requiring a determination of its charter powers as defined by Congress in the act of creating it, is not a case arising under the laws of the United States, and that all the decisions which this Court has made, in cases presented to it respecting the charter of this Company, and other similar Companies created by laws of the United States, shall be determined to have been improperly decided.

We do not believe that the court is prepared to take so radical a step as this.

III.

The Dunn case was rightfully removed from the State Court to the Federal Court, and the action of the Circuit Judge in refusing to remand it to the State Court was proper, and the writ of mandamus should be dismissed.

Respectfully submitted,
JOHN F. DILLON,
RUSH TAGGART,
W. L. HALL,
Attorneys for Respondents.

FILED.
JAN 11 1909
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 10.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF MARY DUNN, IN HER OWN BEHALF, AND AS NEXT FRIEND OF WALTER DUNN, GEORGE DUNN, JAMES DUNN, AND ANGEL DUNN, MINORS, AND AMANDA DUNN, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE EDWARD R. MEEK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Return of Edward R. Meek, United States District Judge, and the Circuit Court of the United States for the Northern District of Texas.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of the United States.

IN THE MATTER OF The Application of MARY DUNN, in her own behalf, and as next friend of WALTER DUNN, GEORGE DUNN, JAMES DUNN, and ANCEL DUNN, Minors, and AMANDA DUNN, for a Writ of Mandamus against the Honorable EDWARD R. MEEK, District Judge of the United States for the Northern District of Texas, and against the CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.	No. 10 Original October Term, 1908.

The return of EDWARD R. MEEK, United States District Judge for the Northern District of Texas, and the Circuit Court of the United States for the Northern District of Texas.

TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Answering the rule granted by this Honorable Court on December 7, 1908, directing that EDWARD R. MEEK, United States District Judge for the Northern District of Texas, and the Circuit Court of the United States for the Northern District of Texas, to show cause on Dec. 21, 1908, why the

prayer of said petition for a writ of mandamus, commanding the remand of a certain cause to the District Court of Dallas County, Texas, and that the said Edward R. Meek and said Circuit Court of the United States for the Northern District of Texas desist from exercising any further jurisdiction in said suit, except the entering of an order remanding said suit, should not be granted, the respondent begs leave respectfully to state as follows :

That the respondent made and entered the orders referred to in the petition of the petitioner denying the motion of the petitioner to remand said cause to the District Court of Dallas County, and also issued an order enjoining the plaintiffs in said cause from the further prosecution of said suit in the District Court of Dallas County, Texas, in the exercise of the jurisdiction and judicial discretion conferred upon the respondent by law, and for the reasons hereinafter more particularly set forth.

As appears from the certified copy of the record herein, and which is hereto attached and made a part of this answer, marked Exhibit A, this is a suit brought by Mary Dunn, for herself and on behalf of her children, against the Texas & Pacific Railway Company, C. W. Slayter and Carl Rasmussen, respectively engineer and fireman of the Texas & Pacific Railway Company, for damages in the sum of $85,000.00. The suit was instituted in the District Court of Dallas County, State of Texas, Fourteenth District, on the first day of August, 1907. The substance of the complaint set forth in said suit, and upon which a recovery is sought against the defendants named therein, is that the said defendants in said cause operated one of the trains of the defendant in such a negligent manner as to result in the death of one J. J. Dunn, the husband of Mary Dunn, and father of her children ; that through the negligent handling of said train the said J. J. Dunn was struck by the locomotive attached to said train at a point

on Pacific avenue, in the City of Dallas, Texas, and killed. The Texas & Pacific R'y Co. and the said C. W. Slayter and Carl Rasmussen, respectively engineer and fireman of said The Texas & Pacific R'y Co., and in charge of said engine, were charged jointly with negligence in the operation of said train that proximately caused the injuries which produced the death of said J. J. Dunn.

The plaintiffs alleged in their petition that they were residents of Dallas county, Texas, which is within the Northern District of Texas, and in the territory returnable to the Dallas division of the Circuit Court of the Fifth Circuit. The petition alleged that The Texas & Pacific Railway Company was a corporation duly incorporated, with an office and local agent in Dallas county, Texas; that the defendants C. W. Slayter and Carl Rasmussen were each residents and resident citizens and inhabitants of Harrison county, in the State of Texas. Harrison County is in the Eastern District of said State.

The Texas & Pacific Railway Company filed its petition and bond for removal, the said C. W. Slayter and Carl Rasmussen joining in same, in the District Court of Dallas County, on or before the 10th day of September, 1907, the date the said defendants would have been required to answer in the State court, said petition and bond being in due form and duly verified by the affidavit of E. W. Tower, the assistant auditor of The Texas & Pacific Railway Company, and said petition and bond for removal were presented to the Judge of the District Court of Dallas County in due time for an order to remove. The grounds set forth in the petition for removal filed by The Texas & Pacific R'y Co., and joined in by C. W. Slayter and Carl Rasmussen, were as follows:

"(1) That The Texas & Pacific Railway Company was and is a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: 'An Act to incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' ap-

proved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to 'The Texas and Pacific Railway Company.'

"(2) That the plaintiff's action was begun on the first day of August, 1907, and that defendants' answers, by the law of the State of Texas and the rule of the court, were not required to be made before the 10th day of September, 1907.

"(3) That the plaintiff, Mary Dunn, for herself and as next friend for her children mentioned as plaintiffs, joined by Amanda Dunn, who was joined *pro forma* for the purpose of having her rights adjudicated, but who sought no recovery, claimed damages in the sum of $85,000.00 against the defendants; that the suit against The Texas & Pacific Railway Company was one arising under the laws of the United States, especially the laws constituting the charter of said defendant, and under which it was incorporated, viz., the act of Congress of the United States, approved March 3, 1871, entitled, 'An Act to incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' and acts amendatory thereof and supplemental thereof, approved respectively May 2, 1872, March 3, 1873, and June 22, 1874.

"(4) That said action was a civil suit, arising under the laws of the United States, of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by act of Congress approved March 3, 1887, to-wit, an act entitled, 'An Act to amend the act of Congress approved March 3, 1875, entitled, "An Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes," ' and the act of Congress approved August 13, 1888, entitled, 'An Act to correct the enrollment of an act approved March 3, 1888, "An Act to amend Sections 1, 2, 3 and 10 of an act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from the State courts, and for other purposes," approved March 3, 1875.'

(5) That the defendants, Slater and Rasmussen, were men of moderate means, unable to respond in damages, and that The Texas & Pacific Railway Company was solely responsible, if any one was, to the plaintiffs, and that the defendant Slayter and Rasmussen were not guilty of any of the wrongs and acts of negligence set up against them, and that each and all of said allegations were falsely and fraudulently made, for the purpose of avoiding removal of said cause, and for defrauding the Circuit Court of the United States of its rightful jurisdic-

tion under said application and bond. Said petition prayed that the court accept said petition and bond, and order the cause removed to the Circuit Court of the United States for the Northern District of Texas."

The petition for removal, as set forth above, was duly presented to the State court, and was denied by the State court on the ground that it did not show proper ground for removal, though the petition was decreed to be regular and the bond sufficient. In due time the defendants filed a transcript of the record and the proceedings in the State court, in the Circuit Court of the United States for the Northern District of Texas, at Dallas, within the time required by law. Said cause was duly docketed, and thereafter, to-wit, on the 30th day of May, 1908, the same came on to be heard by your respondent on motion filed by the complainants therein, to remand the cause. (See page 34 of transcript attached.)

The principal grounds set forth in the motion to remand filed in the Circuit Court were in substance as follows :

"1. The defendants in this cause seek to remove the same, because the suit arises under the laws of the United States, in that The Texas & Pacific Railway Company is incorporated under certain acts of Congress. It does not appear from the record, and particularly from the petition to remove said cause, that any of the defendants are inhabitants of the Northern District of Texas, neither is there any denial in the record by any of the defendants of the allegation contained in plaintiffs' petition; that the defendants Slayter and Rasmussen are inhabitants of Harrison county, Texas, which county is in the Eastern District of Texas.

"2. It appears upon the face of the record herein that there is no separable controversy, as to either of the defendants herein, and that this suit as to the defendants Slayter and Rasmussen does not involve a federal question, neither does it appear from the petition to remove the cause that the said defendants Slayter and Rasmussen are citizens of any State other than the State of Texas, nor is there any allegation in such petition denying the allegation in plaintiffs' petition that they are citizens of the State of Texas, and that they are citizens of the same State of which plaintiffs are alleged to be citizens.

"3. It appears upon the face of the record herein that there is no separable controversy as to any of the defendants, and it does not appear from the petition to remove said cause that each and all of said defendants are inhabitants of the Northern District of Texas; but, on the contrary, it appears from plaintiffs' petition that two of them, to-wit, Slayter and Rasmussem, are inhabitants of the Eastern District, which averment in said petition is not denied by any of the defendants.

"4. It does not appear upon the face of the record herein that plaintiffs' petition alleges any cause of action arising under the Constitution or laws of the United States.

"5. It appears upon the face of the petition to remove this cause that the allegations of fraudulent misjoinder of the parties defendant do not show any acts or facts showing fraud, but simply state conclusions of said defendants, and that therefore the said allegations, to-wit, those contained in the fifth paragraph of said petition, are immaterial and irrelevant, and constitute no grounds upon which a right to remove can be predicated.

"6. The plaintiffs say that they are each and every one of them citizens of the State of Texas and inhabitants of the Northern District of Texas; that the defendants Slayter and Rasmussen are each citizens of the State of Texas, and that each is an inhabitant of the Eastern District of Texas, and that therefore the said defendants cannot be sued by the plaintiffs in the Circuit Court of the United States for the Northern District of Texas, and that consequently neither of said defendants have any right to remove said cause to this court, and that consequently said cause is not removable to this court.

"7. Plaintiffs say that the defendant, Texas & Pacific Railway Company, has its principal office and place of business in the City of New York, in the Southern District of New York, in the State of New York, of which district it is an inhabitant, and that it is not an inhabitant of the Northern District of Texas, and that it cannot be sued by plaintiffs in the Northern District of Texas, by reason of its being a federal corporation; consequently it has not the right to remove this cause to the Circuit Court of the United States for the Northern District of Texas.

"8. The plaintiffs deny the averments contained in the petition for removal, wherein it is alleged that each and all of the acts of negligence of the defendants Slayter and Rasmussen, contained in the plaintiffs' petition, are falsely and fraudulently made, for the purpose of avoiding removal of this cause, and defrauding the Circuit Court of the United States of its right of jurisdiction herein. Plaintiffs allege that the defend-

ants Slayter and Rasmussen were guilty of the wrongs and acts of negligence set up and complained of in plaintiffs' petition against them, and aver that each and all of said allegations are made in good faith, for the purpose of obtaining a judgment against said defendants, by reason of said wrongs and acts of negligence. They, however, aver that by reason of said wrongs and acts of negligence, and by reason of said defendants Slayter and Rasmussen being made parties defendant to this suit, that the Circuit Court of the United States for the Northern District of Texas is rightfully deprived of jurisdiction of this cause, and that by reason thereof there is no right to remove the same to this court."

The defendants in said cause filed their answers to the motion to remand, which were in substance as follows:

"First: That the said motion to remand is insufficient in law, and shows no sufficient cause why said suit should be remanded.

"Second: Further replying to plaintiffs' motion to remand, defendants say:

"(1) That said petition for removal recites that this is a civil suit, of which the Circuit Court for the Northern District of Texas has been given jurisdiction, one of the essential elements of which would be residence of the removing defendant, and defendants say that The Texas & Pacific Railway Company is a resident and has its domicile in this district, and this they are ready to verify. The defendants Slayter and Rasmussen were jointly sued with The Texas & Pacific Railway Company, a resident of this district, at Dallas, Dallas county, within this district, said suit being instituted in a State court under and by virtue of the venue laws of the State of Texas, and such joinder in said suit made this the court of the proper district for the purpose of removal.

"(2) No claim of separable controversy or diverse citizenship, but only the existence of a federal question as to all of said defendants, is involved in this removal, and, therefore, the second ground of the plaintiffs' motion is not applicable.

"(3) The grounds of said motion to remand, as set out in the third paragraph thereof, involve the same question as presented in the first grounds to which defendants have made reply above.

"(4) In reply to the fourth ground, defendants say that the court will take judicial knowledge of the federal character of the defendant, The Texas & Pacific Railway Company, the record shows the joint liability charged as against the other defendants, which the law raises a federal question as to all of said defendants.

"(5) Replying to the sixth ground of plaintiff's motion, defendants say that the citizenship of the defendants, so far as it affects the jurisdiction of the subject-matter, is immaterial, since the federal question that affects The Texas & Pacific Railway Company extends to the other defendants, when jointly sued with it, and jurisdiction is not dependent upon diverse citizenship.

"(6) Replying to the seventh ground, the plaintiffs do not charge in their petition that the principal office of The Texas & Pacific Railway Company is in the City of New York, in the Southern District of New York, in the State of New York, and that it is an inhabitant of said district, and not of the Northern District of Texas, but said facts are charged for the first time in their said motion to remand, and are here denied by defendants, who assert that said defendant is a resident of said Northern District of Texas, and has its domicile in same, and this defendants are ready to verify.

"(7) Defendants further say that neither as a matter of law or as a matter of fact does there exist any sufficient reason why this cause should be remanded to the State court, and expressly deny the existence of any fact that would render the removal of this case to this court improper, and as to the existence of any such fact or facts they ask that said plaintiffs be required to make strict proof."

Upon the issue of fact raised by the motion to remand, and the answer of the defendants thereto, as to where the general office of The Texas & Pacific Railway Company was located, your respondent heard testimony, which is embodied in the transcript hereto attached marked Exhibit A, on pages 35 to 43. After hearing said motion to remand, and the testimony upon the issues of fact, the court was of the opinion that the motion to remand was not well taken, and refused same, and entered an order to that effect, the opinion of the court being that the following jurisdictional facts fixed jurisdiction in the Circuit Court of the United States, and authorized the defendants to remove that cause therein:

(1) The amount sued for in the complaint was the sum of $85,000.00, said sum exceeding the sum or value of $2,000.00, exclusive of interest and costs, thus making the amount sued for jurisdictional.

(2) The defendant therein, The Texas & Pacific Railway Company, was a federal corporation, duly chartered and exist-

ing under acts of Congress of the United States, your respondent following the opinion of the Supreme Court of the United States in the case of The Texas & Pacific Railway Company vs. Cody, 166 U. S., 606 to 610, and The Texas & Pacific Railway Company vs. Barrett, 166 U. S., 617, to the effect that the Circuit Court of the United States would take judicial knowledge of the fact that The Texas & Pacific Railway Company was a federal corporation under the general act of Congress, whether the same was alleged in the face of the petition in the State court or not.

The court further found, as a matter of law, that The Texas & Pacific Railway Company, being a federal corporation, and the amount being jurisdictional, was entitled to remove the cause from the State to the Federal Court, as a suit against it as a cause of action arising under the Constitution or laws of the United States, following the decision of the Supreme Court in the Pacific Removal Cases, 115 U. S., pages 2-23, which have repeatedly been reaffirmed by the Supreme Court of the United States, especially in the following cases :

Texas & Pacific R'y Co. vs. Cody, 166 U. S., 606 to 610.

Texas & Pacific R'y Co. vs. Barrett, 166 U. S., 617.

Also see :

The charter of The Texas & Pacific R'y Co., 16 Statutes at Large, p. 573.

Your respondent was further of the opinion that the joining of local defendants with The Texas & Pacific Railway Company, to-wit, its engineer and fireman, and seeking to hold The Texas & Pacific Railway Company liable on account of the acts of its said engineer and fireman, the cause of action being based alone upon the same transaction, did not prevent or take away the right of The Texas & Pacific Railway Company to remove the cause from the State to the Federal court if the local defendants joined in said application to remove, as was done in this case, your respondent holding that under Section 1 of the Act of March 3, 1887, as amended by the Act of August 13, 1888, United

States Compiled Statutes, 1901, page 508, that the amount being jurisdictional and the cause of action one arising under the Constitution or laws of the United States, the cause could be removed, and further being of the opinion that Section 2 of said act, which provides as follows:

"That any suit of a civil nature at law or in equity arising under the Constitution of the United States, or treaties made or which shall be made under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district,"

fully authorized the removal of a cause where the amount was jurisdictional, and where the cause of action arose under the Constitution or laws of the United States, even though a portion of the defennants were local defendants, if they joined in the application to remove; that it was clearly not the intent of Congress to put the limitation provided in the second paragraph of Section 2, "that the defendant or defendants therein should be non-residents of the State," except where jurisdiction was on account of diverse citizenship, your respondent being of the opinion that the limitation that all of the defendants should be "non-residents" of a State in order to remove a cause from a State court to a Federal court was only applicable to causes where jurisdiction was based upon diverse citizenship, and had no application whatsoever to a cause of action where the jurisdiction was based upon the fact that the cause of action was one that arose under the Constitution or laws of the United States. (See Act of March 3, 1887, United States Compiled Statutes, 1901, Volume 1, pp. 508 and 509.) Also the following authorities:

Cox vs. Texas & Pacific R'y Co., 145 U. S., 593 and 603.

Land vs. C. R. I. & P. R'y Co., 78 Fed. Rep., 385.

Landers vs. Felton, 73 Fed. Rep., 311.

Mitchell vs. Small, 140 U. S., 406.

So. Pac. Co. vs. Johnson, 62 Fed. Rep., 161.

All of the defendants joined in this application to remove.

Texas & Pacific R'y Co. vs. Young, 27 S. W. R., 145.

Mayor et als. vs. Independent Steamboat Co. et als., 21 Fed. Rep., 593.

C. R. I. & P. R'y Co. vs. Martin, 178 U. S., 245.

Your respondent also held that as the cause of action was not based upon diverse citizenship, but was a suit arising under the Constitution or laws of the Unitad States, and the amount being jurisdictional, that the defendants alone could plead their privilege to be sued in any particular district; that this right was not one of *jurisdiction*, but was purely a personal plea of privilege as to venue, which the defendants had waived, and which the defendants had the right to waive, and which the plaintiffs had no right to make. (See In the Matter of Moore, 209 U. S., 490.)

While evidence was introduced before the court (as shown by the transcript of the record herein), revealing that the Texas and Pacific Railway Company maintained its general and operating offices in the City and County of Dallas, Texas, and that its Vice-President and General Manager were located there, yet, irrespective of this, and because the Texas and Pacific Railway Company is a federal corporation, not having its domicile or general offices specifically fixed by its charter or law of its creation, and operating its line through and having agents in this district, the court was of the opinion that the case was properly removable to the Circuit Court of the United States for the Northern District of Texas, at Dallas; also, that the Texas and Pacific Railway Company, being suable in this district, defendants sued jointly with it for the same cause of action, though living in other districts, could be sued in this district. (Section 10 of the Act to divide Texas into Four Judicial Districts, March 11, 1902, 32 Statutes at Large, 68.)

Respondent further says that the Circuit Court was au-

thorized to issue an injunction restraining the further prosecution of the suit in the State Court, pending the determination by it of the question of Jurisdiction, and, having retained jurisdiction, was authorized to continue such injunction in force and effect. (See Madisonville Traction Company versus Saint Bernard Mining Company, 196 U. S., 239; McAlester versus Chesapeake & Ohio Railway Company, 157 Fed. Reporter, 740.)

Your respondent submits to the judgment of this honorable court and respectfully refers to the brief of John F. Dillon and Rush Taggart, officers of this court, which will be filed in this case, and the authorities therein referred to, to show cause why the writ of mandamus should not issue.

EDWARD R. MEEK,
Judge of the Circuit Court of the United States,
Fifth Circuit.

Dallas, Texas, December 28, 1908.